DOCKET

No. 83-1170-CFX
Status: GRANTED

Title: United States, Petitioner
v.
50 Acres of Land, etc., et al.

Docketed:
January 16, 1984

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Nichols, M. Louis

Entry	Date	Note	Proceedings and Orders
1	Dec 7 1983		Application for extension of time to file petition and order granting same until January 17, 1984 (White, December 8, 1983).
2	Jan 16 1984	G	Petition for writ of certiorari filed.
3	Feb 13 1984		Brief of respondent Duncanville in opposition filed.
4	Feb 15 1984		DISTRIBUTED. March 2, 1984
5	Feb 23 1984	X	Reply brief of petitioner United States filed.
7	Mar 9 1984		REDISTRIBUTED. March 16, 1984
8	Mar 19 1984		Petition GRANTED.
9	Mar 30 1984		Record filed.
10	Mar 30 1984		Certified original record & C.A. proceedings received.
11	Apr 19 1984	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Apr 30 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	Apr 20 1984		Order extending time to file brief of petitioner on the merits until June 2, 1984.
15	Jun 1 1984		Order further extending time to file brief of petitioner on the merits until June 11, 1984.
17	Jun 11 1984		Brief of petitioner United States filed.
18	Jun 21 1984	D	Motion of respondent and National Governors' Association, et al. for divided argument to permit National Governors' Association, et al. to present oral argument as amici curiae filed.
19	Jul 2 1984		Motion of respondent and National Governors' Association, et al. for divided argument to permit National Governors' Association, et al. to present oral argument as amici curiae DENIED.
20	Jul 5 1984		Brief of respondent Duncanville, TX filed.
21	Jul 5 1984		Brief amicus curiae of Council of State Governments filed.
22	Aug 8 1984		CIRCULATED.
23	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 2, 1984. (4th case)
24	Aug 31 1984	G	Motion of Open Lands Project, et al. for leave to file a brief as amici curiae filed.
25	Sep 21 1984	X	Reply brief of petitioner United States filed.
27	Oct 1 1984		Motion of Open Lands Project, et al. for leave to file a brief as amici curiae GRANTED.
28	Oct 2 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83 - 1170

No.

Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE
CITY OF DUNCANVILLE, TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, when the United States exercises its power of eminent domain to take property owned by a state or local government entity, the Just Compensation Clause requires payment of compensation measured by reference to the cost of acquiring a substitute facility, rather than the usual fair market value standard.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 706 F.2d 1356. The district court's opinion (App. B, *infra*, 20a-28a) is reported at 529 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 29a-30a) was entered on June 13, 1983. Timely petitions for rehearing were denied on September 19,

1983 (see App. D, *infra*, 31a-32a). On December 8, 1983, Justice White extended the time for filing a petition for a writ of certiorari through January 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

1. The United States commenced this action on October 3, 1978, by filing a complaint in condemnation, coupled with a declaration of taking, pursuant to 40 U.S.C. 258a, in the United States District Court for the Northern District of Texas. The site acquired was a 50-acre sanitary landfill, owned by respondent, the City of Duncanville, Texas, used for the purpose of disposal of regular garbage collections. The site was needed by the United States to accommodate the United States Army Corps of Engineers Lakeview Lake flood control project (subsequently renamed the Joe Pool Lake flood control project). As estimated compensation, the United States paid $199,950 into the registry of the court, which was subsequently paid over to respondent. App., *infra*, 3a & note 2.

The landfill site had been operated by respondent for that purpose since 1969; since 1977, the City had operated its landfill under a state permit (Tr. 69-71). At the date of taking, approximately 15 acres of respondent's landfill had been filled with waste and approximately five acres of the total area were unusable for landfill because of the presence of a creek (App., *infra*, 13a & note 8; Tr. 85). Approximately

313,000 cubic yards of the landfill's capacity had been used, and the remaining capacity was 650,000 cubic yards, an amount that gave it an expected lifetime of 12.8 years (App., *infra*, 14a; Tr. 383-388, 398). Immediately adjacent to respondent's landfill was a privately owned landfill on a 64.28 acre tract, which had also been acquired by the United States (Tr. 211-213, 345, 352).

Following the United States' acquisition of respondent's landfill site, respondent acquired a new landfill facility, consisting of 113.7 acres, at a site approximately the same driving time from Duncanville as the prior facility. According to the uncontradicted testimony of an expert geologist at trial, more favorable soil and water-table conditions at the new site made it a better landfill location than the former site; the new site could be excavated to a depth of 20 feet, twice the usable depth of the former landfill. The usable capacity of respondent's new site was 2,100,000 cubic yards, giving it an expected lifetime of 41.6 years. The residual capacity of the former site thus was only 38.8% of the capacity of the replacement landfill. App., *infra*, 3a, 13a-14a; Tr. 397-399.

2.a. Prior to trial, a dispute emerged between the parties as to the proper measure of just compensation. The government contended that fair market value was the applicable standard; respondent maintained that it was entitled to recover the cost to the City of acquiring, improving and putting into operation its substitute facility, which it claimed amounted to over $1,276,000 (see App., *infra*, 16a-17a n.10). In order to resolve this dispute as to the proper measure of compensation, the government filed a motion in limine, requesting that the court limit the evidence to be received at trial to evidence relating to the fair market value of the property, and that all evidence as

to the cost of reproducing the property taken or acquiring a substitute facility, be excluded (R. 62-79). This motion was denied (R. 111), the district court noting that in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 509 n.3 (1979) (*Lutheran Synod*), this Court had reserved the question whether a substitute facilities measure of compensation is appropriate when publicly owned property is taken. The district court reasoned that "a complete factual record should be developed from which an independent determination of the appropriate measure of compensation can be made" (R. 111).

b. The issue of just compensation was then tried to a jury. Both parties presented testimony as to the fair market value of the property taken. Appraisers who testified for the government and those testifying for respondent agreed that a distinct market existed for landfill properties in the vicinity of Duncanville, and that the fair market value of the condemned site was readily ascertainable by reference to sales of other, comparable, landfill properties in the area. See App., *infra*, 7a; *id.* at 25a.[1]

In addition, over the government's continuing objection (R. 151-152), respondent presented the testimony of Robert B. Lee, Duncanville's Director of Public Works, that the aggregate cost of acquisition

[1] The government's witnesses all testified that a market for landfills existed in the area, and testified to fair market value appraisals of respondent's landfill site ranging from $160,410 to $190,000, based upon comparable sales data (Tr. 208, 218-229, 249-250, 276, 295-297, 298-310, 345-353, 360). Appraisers Carl Mash and R. Edwin White, who testified for respondent, agreed that a market existed for landfill properties in the area, and, based upon comparable sales, offered valuation appraisals of $370,000 and $367,583, respectively (Tr. 140, 173-178, 182, 189-190).

and preparation of the substitute landfill site established by the City was $1,276,311.76 (Tr. 78). Lee's testimony indicated that although respondent has the power of eminent domain it did not attempt to acquire a landfill site comparable in size to its former site, and that respondent did not have the new landfill site it purchased appraised prior to making its negotiated purchase and did not bargain with the vendor over the price (Tr. 91-94). The testimony of the government's appraisers indicated that the amount paid by respondent to purchase its substitute site was substantially in excess of the fair market value of that site (Tr. 273, 282, 319-321, 357). The United States moved to strike Lee's testimony, on the ground that it was not probative of the value of a reasonably necessary substitute facility (Tr. 433-434). The court denied the government's motion (Tr. 435).

c. At the close of the evidence, the district court submitted the case to the jury, directing the jury to respond to special questions. Through these questions, the jury was asked to determine both the fair market value of respondent's landfill on the date of taking, and the cost to respondent of establishing a substitute sanitary landfill.[2] The government objected unsuc-

[2] The jury was instructed (App., *infra*, 18a):

> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Simply stated, the cost of substitute facilities represents that amount of just compensation in money to be

cessfully to submission of the substitute facilities issue to the jury (Tr. 499-500; see also R. 151-152), while respondent objected unsuccessfully to submission of the fair market value question (Tr. 499-500). The jury returned a verdict of $225,000 based upon the fair market value standard, and an alternative verdict of $723,654.01 as the cost of substitute facilities (App., *infra*, 4a).

d. Each party moved for entry of judgment based upon the verdict reflecting the measure of compensation it advocated (R. 203, 223). The district court entered judgment against the United States in the amount of the fair market value of the property taken, as determined by the jury ($225,000) plus interest at the rate of 6% due upon the deficiency in the estimated compensation previously paid by the United States.[8]

The district court held, initially, that respondent "did not meet its burden of establishing what would be a reasonable cost of a substitute facility" (App., *infra*, 22a). The court noted that respondent's evidence reflected only its actual costs in acquiring and developing its new landfill site, which was much

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awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

[8] The district court assumed that, as respondent contended, the 6% interest rate on such deficiencies prescribed by the Declaration of Taking Act must be regarded as a floor, rather than a ceiling, on the interest to be awarded, lest the discrepancy between the statutory rate and a market interest rate render the statute unconstitutional (App., *infra*, 26a-27a). But because respondent had presented no evidence from which an appropriate interest rate could be determined, the court declined to award interest in excess of the statutory rate (*id.* at 27a).

larger than the facility being replaced, and had more unused capacity. The court also suggested that the evidence indicated that the purchase price paid by respondent was excessive. App., *infra*, 21a-22a.

The district court also held that, even if the evidence supported a finding as to the reasonable cost of an equivalent facility, the fair market value standard was the proper measure of just compensation, where, as here, a market for property of the kind taken exists, and a market value is ascertainable (App., *infra*, 22a-25a). Noting that fair market value is ordinarily the proper measure of compensation, the court found that neither of the exceptions to that rule recognized by this Court in *Lutheran Synod*, 441 U.S. at 513, was applicable (App., *infra*, 23a-25a). The court observed, first, that here, unlike cases involving taking of streets or sewers or other local government property for which no market exists, or for which the market is so thin as to make comparable sale data unreliable, the record established that a fair market value was readily ascertainable for the property taken (*ibid.*). Second, the court determined that compensation based upon fair market value placed respondent "in as good a position pecuniarily as if its property had not been taken" and that an award based upon fair market value accordingly "does not impermissibly deviate from the indemnity principle" (*id.* at 25a). The court also noted that the fair market value standard is a desirable one because it provides a relatively objective measure of compensation due (*id.* at 22a).

3.a. The court of appeals reversed and remanded for further proceedings (App., *infra*, 1a-19a). The court of appeals recognized that this Court's decision in *Lutheran Synod* left open the questions

whether, and in what circumstances, the usual fair market value measure of compensation may be superseded by a substitute facilities cost measure when publicly owned property is taken (App., *infra*, 4a). The court also recognized that the substitute facilities doctrine has generally been applied to taking of "streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined" (*id.* at 6a). And the court acknowledged (*id.* at 7a (footnote omitted)):

> [t]his is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.

Nevertheless, the court of appeals concluded that "the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property" (App., *infra*, 7a). Reasoning from the "indemnity principle" underlying the Fifth Amendment Just Compensation Clause, the Court concluded that respondent would not be made whole unless reimbursed for "the amount of money reasonably spent in [its] venture to create a functionally equivalent facility" that it was obliged to establish (*id.* at 9a).[4]

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[4] The court of appeals assumed for the purpose of its analysis that replacement of respondent's landfill facility was either a legal or practical necessity, but left open for consideration on remand the question whether this was, in fact, so (App., *infra*, 8a-9a & note 6).

The court of appeals recognized (App., *infra*, 11a) that in *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (1964), the Eighth Circuit had "apparently reached a different conclusion," holding that the cost of substitute facilities was an improper measure of compensation for the taking of publicly owned property where the market value of that property was ascertainable. But the court below insisted that its decision "creates no conflict" because it believed that a district court finding in *South Dakota Game, Fish and Parks Department* that it was necessary to replace the property taken there, was "highly suspect" (App., *infra*, 12a). In addition, the court below believed that language in an intervening Eighth Circuit decision, *United States* v. *3,727.91 Acres of Land*, 563 F.2d 357, 359 n.2, 360 (1977) (*Elsberry Drainage District*), cast doubt upon the Eighth Circuit's continued adherence to the rule reflected in its earlier decision (App., *infra*, 12a).

b. The court of appeals also rejected the district court's alternative holding that respondent had not met its burden of proving the cost of a functionally equivalent substitute facility. By presenting testimony as to the cost of acquiring and developing its substitute site, and testimony that the entirety of the substitute site had been acquired in order to avoid severance damage claims that respondent believed would be costly, respondent had met its burden of going forward with evidence of the cost of substitute facilities, the court held. App., *infra*, 12a-13a.

Nevertheless, the court of appeals did not direct entry of judgment based upon the jury's alternative verdict. The court observed that the substitute site acquired by respondent was substantially larger in

area and usable to a greater depth, and accordingly could be expected to serve respondent for a far longer time, than its former site that had been acquired by the government. The court of appeals held that the district court's instructions defining the substitute facilities measure of compensation (see page 5 note 2, *supra*) "did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (App., *infra*, 14a) and that a remand for retrial accordingly was required. The precise manner in which such a deduction was to be made was left open for determination on remand (*id.* at 16a).[5] The court stated that respondent "is entitled to reimbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill"

[5] The court suggested that one permissible method of making this adjustment would be to deduct from the cost of substitute facilities a fraction of the total equal to "one minus the ratio that the remaining useful life of the condemned [property] bears to the useful life expectancy of the substitute facility" (App., *infra*, 15a n.9, quoting *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 n.11 (2d Cir. 1968)).

Also remanded for redetermination was the question of the interest rate to be paid upon any deficiency ultimately determined to be due. The court of appeals reasoned that, because a remand was in any event necessary, respondent should be allowed another opportunity to present evidence on the interest issue (App., *infra*, 18a-19a). Applying its prior decision in *United States* v. *329.73 Acres of Land*, 704 F.2d 800, 812 (1983) (en banc), the panel also ruled that interest was not to be limited to the 6% rate specified in the Declaration of Taking Act (App., *infra*, 18a). See page 6 note 3, *supra*. And reasoning that "the proper interest rate is an element of 'just compensation,'" the court of appeals directed that the interest rate issue be submitted to the jury upon remand (App., *infra*, 19a).

(*id.* at 17a). The court cautioned that "[w]hether the price actually paid [by respondent for its new site] is reasonable under the circumstances is for the jury to decide" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided a significant question arising under the Just Compensation Clause, that this Court expressly reserved in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 509 n.3, 515 (1979) (*Lutheran Synod*). The rule adopted in the decision below is contrary to the general principles governing determination of just compensation that have been developed by this Court, and is squarely contrary to the Eighth Circuit's decision in *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (1964)—which remains the law of that circuit. By imposing the substitute facilities measure in situations where the traditional fair market value standard provides a workable and fair method of determining just compensation, the decision below renders that determination unnecessarily burdensome and speculative.

1.a. In *Lutheran Synod*, this Court held that the Just Compensation Clause does not require the United States to pay damages measured by the cost of substitute facilities—instead of the traditional fair market value standard—when the United States takes property owned by a private nonprofit organization that is operated for a public purpose. Although the Court declined to intimate any view as to whether, or under what circumstances, the cost of substitute facilities might be the constitutionally mandated measure of just compensation when publicly owned property is taken (*Lutheran Synod*, 441 U.S. at 509 n.3,

515), the Court's opinion outlines the fundamental principles that are controlling here (*id.* at 510-511 (emphasis added, footnote omitted)):

> In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States*, 292 U.S. 246, 255 (1934). *However, this principle of indemnity has not been given its full and literal force.* Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. *See United States* v. *Miller*, 317 U.S. 369, 374 (1943); *United States* v. *Cors*, 337 U.S. 325, 332 (1949). The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States* v. *Miller*, *supra*, at 374 [additional citations omitted].

Notwithstanding the idealized indemnity principle, the Court has explicitly recognized that the fair market value standard fulfills the constitutional requirement of just compensation even when such an award does not "compensate for all values an owner may derive from his property" and omits the "special value of property to the owner arising from its adaptability to his particular use" (*Lutheran Synod*, 441 U.S. at 511).

Justice Frankfurter, writing for the Court, explained the foundation for the market value standard in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949):

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.

In sum, the Court has adopted the fair market value standard of compensation because it strikes a necessary and proper " 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose" (*Lutheran Synod*, 441 U.S. at 512, quoting *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949)).

The Court has recognized that there are two situations where an alternative measure of just compensation must be fashioned because the fair market value standard would be inappropriate: "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public" (*United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). Thus here, as in *Lutheran Synod*, the fair market value measure of just compensation must be applied unless "application of the fair-market-value standard • • • would be impracticable or • • • an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment" (441 at 513).

b. The decision below is irreconcilable with this Court's teaching summarized above. Indeed, the linchpin of the court of appeals' analysis is an approach to the case that, in the guise of fidelity to that teaching, actually stands the governing principle on its head (App., *infra*, 7a-8a (emphasis added)):

> Although the indemnity principle which animates the just compensation clause of the Fifth Amendment "has not been given its full and literal force," *Lutheran Synod*, 441 U.S. at 510-11, 99 S.Ct. at 1856-57, 60 L.Ed.2d at 440, *it must nevertheless be our aim* to place a condemnee "in as good a position pecuniarily as if his property had not been taken. * * *" *Olson* v. *United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236, 1244 (1934).

Compare page 12, *supra*. And the court of appeals plainly did not find that either of the two situations that justify a departure from the fair market value measure of compensation is presented here.

First, there can be no claim here that market value "is too difficult to ascertain" or that the property involved is of a "type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property" (*Lutheran Synod*, 441 U.S. at 513). The court of appeals frankly conceded that respondent's "landfill has a determinable market value" (App., *infra*, 7a), a conclusion clearly compelled by the record (see page 4 & note 1, *supra*). Accordingly, here, as in *Lutheran Synod* itself (441 U.S. at 513-514), practical considerations pertaining to the determination of a representative market value provide no justification for a departure from the fair market value standard.*

Nor did the court of appeals purport to determine that "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment" (*Lutheran Synod*, 441 U.S. at 513). Indeed, the court of appeals did not undertake to give any reason why a properly determined award of just compensation based upon the fair market value standard would be inadequate—much less so substantial a departure from the indemnity principle as to violate the Fifth Amendment. The district court has determined that the fair market value award embodied in its judgment did place respondent "in as good a position pecuniarily as if its property had not been taken" and that the award accordingly "does not impermissibly deviate from the indemnity principle" (App., *infra*, 25a). Yet, the court of appeals did not explicitly find any error in the district court's assessment. Rather, the court of appeals assumed to decide by its own lights that use of any measure of compensation other than the cost of substitute facilities "would be to deny just compensation" (App., *infra*, 9a).

In support of its conclusion, the court of appeals observed that, unlike the nonprofit camp operator in *Lutheran Synod* (see 441 U.S. at 515-516), respondent "presumably was required to spend certain mon-

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* The court of appeals correctly recognized (App., *infra*, 6a) that the substitute facilities cost measure of compensation has typically been applied when the market value of publicly owned property is not reasonably ascertainable. This case does not present any question as to the availability of compensation measured by substitute facilities costs in such circumstances.

ies to purchase a new landfill site and prepare that site for its purpose," (App., *infra*, 8a).[7] But so to state is scarcely to establish the constitutional inadequacy of compensation for the taking measured by the fair market value of the property taken. See *Lutheran Synod*, 441 U.S. at 518-519 (White, J., concurring).[8] The court of appeals reasoned that respondent's "loss from the condemnation was the amount of money reasonably spent in [respondent's] venture to create a functionally equivalent facility" (App., *infra*, 9a). The court of appeals evidently assumed that an award of fair market value compensation would impermissibly leave respondent less than whole. That assumption, however, runs directly afoul of the definition of fair market value: "what a willing buyer would pay in cash to a willing seller" at the time of the taking (*United States* v. *Miller*, 317 U.S. 369, 374 (1943); *Lutheran Synod*, 441 U.S. at 511; *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973)). Because the record establishes that a market existed for landfill properties comparable to respondent's former site in the vicinity of Duncanville, and that the fair market value of the condemned property was ascertainable, it is not obvious that the *reasonable* cost of a functionally *equivalent* substitute facility would be

[7] See page 8 & note 4, *supra*.

[8] Justice White also wrote (441 U.S. at 519 (emphasis added; footnote omitted)):

> I * * * have substantial doubt that the [Just Compensation] Clause should be * * * construed and applied [to require payment of the cost of a substitute facility] where public property is condemned, *whether or not the function conducted on the property must be continued at another location.*

greater than what a willing buyer would pay to a willing seller for such a facility. See App., *infra*, 24a.[9]

c. The court of appeals quite correctly recognized, of course, that if respondent were awarded the entire amount it expended in acquiring and developing the substitute facility it actually established, it would, for two separate reasons, stand to receive a substantial windfall. First, the court acknowledged, such a measure would overcompensate respondent because the substitute facility it acquired is substantially larger, more capacious, and has a much longer usable life, than the landfill being replaced (App., *infra*, 13a-14a). Second, the court indicated respondent would be overcompensated if reimbursed for its actual expenses if those expenses were not "reasonable under the circumstances" (*id.* at 17a). To limit the windfall potential of the substitute facilities courts meas-

[9] It is possible, of course, that respondent's former site had some features of purely idiosyncratic value, that would not be reflected in the fair market value of the property. But it is settled that such elements of "value" are outside of the constitutional mandate for just compensation. *Kimball Laundry*, 338 U.S. at 5-6. Moreover, the very structure of the Fifth Amendment strongly suggests that transferable value, measured by the fair market value standard, satisfies the mandate for just compensation. As the Court observed in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893):

> [J]ust compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

ure, the court of appeals devised two correctives: First, the court held that upon remand the jury should be instructed to make an appropriate deduction from the substitute facilities cost to reflect "the benefits which Duncanville gained from the acquisition of the new fill" (*id.* at 14a; see page 10 & note 5 *supra*). Second, the court of appeals made clear that the jury should be instructed upon remand to disallow the costs respondent seeks to recover to the extent they exceed what is "reasonable under the circumstances" (App., *infra*, 17a).

The very adjustments that the court of appeals recognized to be necessary confirm that its decision to abandon the fair market value criterion was unjustified. If the adjustments are to achieve the objectives outlined by the court of appeals, they amount to highly inefficient and speculative means of achieving through a substitute facilities cost based computation, a result that approximates the fair market value of the property taken. For instance, while deduction from the cost of substitute facilities of an amount reflecting the enhanced value of the new facility as compared with the old undoubtedly will limit the windfall potential of the substitute facilities measure, the same objective is achieved, more directly, by determining the market value of the property actually taken, through examination of comparable sales. See *Lutheran Synod*, 441 U.S. at 518 (White, J., concurring). Moreover, although the court of appeals found fault with the district court's instructions in this regard (see page 10, *supra*), it did not specify how an appropriate deduction reflecting the enhanced value of the replacement facility should be calculated, and suggested that various approaches might be acceptable. (App., *infra*, 15a & note 9). This amorphous prescription for an inherently subjective adjustment

is a poor substitute for the "relatively objective working rule" (*Lutheran Synod*, 441 U.S. at 511) afforded by fair market valuation.

Similarly, the court of appeals' casual suggestion that whether respondent's actual expenditures were "reasonable under the circumstances" is a question for the jury on remand (App., *infra*, 17a) cloaks a complex matter with a deceptively simple label. The Court did not indicate *how* the jury was to make this assessment. But unless the jury is to be turned loose to speculate on this matter, it must have both evidence and a legal standard to guide it; the best available benchmark for determining reasonableness in the circumstances, however, is the market value of the property acquired. The combined effect of the two adjustments contemplated by the court of appeals, then, if they are meticulously carried out, will be to attempt to reconstruct the market value of the property actually taken. But the result, at best, will be to superimpose superfluous layers of complexity upon a determination that can more readily and directly be made through the traditional fair market value approach.

No warrant exists for this burdensome departure from the ordinary method of determining just compensation. Moreover, it is reasonable to fear that, as a practical matter, the United States will be unfairly prejudiced by the procedure prescribed by the court of appeals. Because that procedure focuses undue attention upon the actual expenditures incurred by a condemnee such as respondent, irrespective of their reasonableness in the circumstances and the substantial disparities between the value of what was taken and that of the substitute facility acquired, the likely result is that the United States not infrequently will be held liable for amounts substantially in excess of the fair market value of the property it has acquired.

In sum, here, just as in *Lutheran Synod*, "[t]o the extent denial of a [substitute facilities cost] award departs from the indemnity principle, it is justified by the necessity for a workable measure of valuation" (441 U.S. at 516-517), and is "consistent with the 'basic equitable principles of fairness,' *United States* v. *Fuller*, 409 U.S. 488, 490 (1973), underlying the Just Compensation Clause" (441 U.S. at 517). Because the court of appeals' ruling will place substantial unjustifiable burdens upon the courts in determining just compensation for the taking of publicly owned property in situations where that burden is readily avoidable, and creates a substantial risk that unfair judgments will be entered against the United States in a recurring situation, further review by this Court is warranted.

2. As the court of appeals acknowledged (App., *infra*, 11a), its decision is contrary to the Eighth Circuit's ruling in *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (1964). The explanations given by the court below for its insistence that its decision nevertheless "creates no conflict" (App., *infra*, 12a) do not withstand examination. The court below suggested, first, that a district court finding in that case that the condemnee needed to replace the parkland taken by the United States there "was highly suspect" (*id.* at 12a). But the Eighth Circuit did not hold substitute facilities compensation unavailable for that reason, but because (as the court below itself recognized (*id.* at 11a)) there was no "need or justification for a departure from the concept of market value as the standard of just compensation in Federal eminent domain cases" and because it was accordingly prejudicial error to submit the compensation issue to

the jury on a "substitute site theory" (329 F.2d at 668).[10] Thus, the observation of the court below cannot gainsay the conflict."

The court of appeals' alternative suggestion (App., *infra*, 12a) that, in light of certain language in *Elsberry Drainage District*, the continuing vitality of *South Dakota Game, Fish and Parks Department* is questionable, is simply incorrect. In *Elsberry Drainage District*, the United States acquired by eminent domain a strip of land, occupied by levees and ditches, that was owned by the Drainage District, for the purpose of creating a wildlife refuge. Because the Drainage District had presented no evidence that it would need to replace the levees and ditches that had been taken, the district court, applying a substitute facilities cost standard, had awarded the District only nominal damages as compensation for the taking. The court of appeals reversed and remanded for redetermination of compensation pursuant to the fair market value standard (563 F.2d at 361). The court explained that, because the Drainage District owned the property in the fee simple, it was entitled to compensation gauged by the fair market

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[10] The Eighth Circuit also held that it was improper to have submitted an interrogatory to the jury that required it to determine whether "there [wa]s an obligation and need" for the state to establish a substitute for the park condemned, noting that the question of obligation was one of law (329 F.2d at 668). But the court below acknowledged that this was an additional holding, and not the sole ground of the decision (App., *infra*, 11a).

[11] The implication of the court's suggestion is that it might have reached the same result as the Eighth Circuit did, albeit not for the same reason. But that suggestion affords no reason for doubting that the Eighth Circuit would have reached a result contrary to the ruling below, in this case.

Accordingly, the decision below is squarely at odds with *South Dakota Game, Fish and Parks Department*, and presents a conflict that warrants resolution by this Court.[10]

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public condemnee is entitled to the cost of constructing a functionally equivalent substitute.

This passage simply does not address the availability of substitute facilities costs compensation in excess of fair market value in the situation where a market exists for the property taken and market value is readily ascertainable.

For the same reason, the Eighth Circuit's statement (563 F.2d at 359 n.2) that the key to the application of this doctrine is whether the facility need be replaced, does not carry the implication ascribed to it by the court below (App., *infra* 12a). Nor, contrary to the court of appeals' implication (*ibid.*) does the Eighth Circuit's citation of the latter proposition to *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 803-804 (2d Cir. 1968), suggest a change in the Eighth Circuit's views. To be sure, *Borough of Manhattan* itself holds that substitute facilities costs compensation is not limited to situations where market value is not ascertainable (*id.* at 803), but the passage from *Borough of Manhattan* referenced by the Eighth Circuit does not address that subject, but only the question whether, assuming an award of substitute facilities costs is otherwise appropriate, a showing that acquisition of a substitute is impelled by practical necessity, as opposed to legal obligation, is sufficient to support such an award. *Borough of Manhattan*, of course, is contrary to *South Dakota Game, Fish and Parks Department*; but it was decided prior to *Lutheran Synod*, and because it does not rest upon a determination that fair market value compensation impermissibly deviates from the indemnity principle, is unsound. See pages 12-13, and 14-17, *supra*.

[10] We note that the court of appeals' ruling that the rate of interest to be awarded upon the deficiency in estimated compensation should be determined by the jury rather than the court (see page 10 note 5, *supra*) is open to serious question. *Cf. United States* v. *Reynolds*, 397 U.S. 14 (1970). In limiting

value of the property in any available use, and was not limited to the nominal damages that are yielded by a substitute facilities costs measure in those situations where there is no need to replace the property taken (*id.* at 359-360).

The language quoted by the court of appeals (App., *infra*, 12a) from *Elsberry Drainage District* plainly does not call in question the holding of *South Dakota Game, Fish and Parks Department*. Read in context, the statement that the "substitute facilities doctrine is not an exception to the fair market value test but merely an alternative means of determining what just compensation is when a public facility is involved" (563 F.2d at 360) merely explains that a public condemnee is not to be compensated at less than the fair market value standard simply because a substitute facilities measure yields a lower figure when there is no need to replace the facility at all (see 563 F.2d at 359-360). Any doubt as to the Eighth Circuit's views on the question presented in this case is set at rest by the express reaffirmation of the fundamental rule in *Elsberry Drainage District* (563 F.2d at 361 (emphasis added)):

> The basic measure of compensation in a condemnation case is the property's fair market value. *Only when fair market value cannot be determined or would provide inadequate compensation are other measures of value appropriate.*[11]

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[9] Equally unsupportive of the court of appeals' hypothesis that the Eighth Circuit has altered its views is the wholly unremarkable definition of the substitute facilities doctrine found in a footnote in *Elsberry Drainage District*, 563 F.2d 359 n.2 quoted by the court below (App., *infra*, 12a):

> Under the substitute facility doctrine if the structure is reasonably necessary for the public welfare, then the

CONCLUSION

The petition for a writ of certiorari should be granted.[14]

Respectfully submitted.

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JANUARY 1984

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our petition to the substitute facilities issue—the question we deem most worthy of review by this Court in the setting of this case—we do not signal endorsement of the court of appeals' ruling on the aforementioned point and assume the issue will remain open for later resolution in an appropriate case.

[14] As we explain in our brief in opposition in *City of Duncanville* v. *United States*, No. 83-714 (page 16 n.13) the procedural issue presented by that petition is wholly unrelated to the question that we present for review.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1615

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

50 ACRES OF LAND, ETC., ET AL., DEFENDANT

THE CITY OF DUNCANVILLE, DEFENDANT-APPELLANT

June 13, 1983

Rehearing and Rehearing En Banc
Denied Sept. 19, 1983

Appeal from the United States District Court
for the Northern District of Texas
529 F.Supp. 220

Before BROWN and JOLLY, Circuit Judges, and MAHON *, District Judge.

JOHN R. BROWN, Circuit Judge:

Today we find ourselves lodged among melon rinds, coffee grounds, countless tin cans and sundry other

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* District Judge of the Northern District of Texas, sitting by designation.

unlikely neighbors amidst the City of Duncanville sanitary landfill. In this ignoble setting, we examine one of our most treasured constitutional principles—the Fifth Amendment's precept that private property shall not be taken for public purposes without just compensation. We consider the question of what constitutes the payment of "just compensation" to a public condemnee who has a duty to replace a condemned public facility. Appellee, the United States, contends that Duncanville is entitled only to the fair market value of its old landfill, which was condemned by the government. Duncanville argues that just compensation is the cost of a substitute landfill. We agree with Duncanville and conclude that under the Fifth Amendment a public condemnee which has a legal or factual duty to replace a condemned facility is entitled to the reasonable cost of a functionally equivalent substitute facility. We conclude also that the trial court's instruction concerning the substitute facilities standard was inadequate to enable the jury to make an intelligent determination of that cost. Accordingly, we remand for a new trial.

Indeed, this case is redolent with Fifth Amendment issues, as Duncanville objects also to the trial court's award of 6% interest under the Declaration of Taking Act, 40 U.S.C. § 258a. This Court has very recently held that the 6% rate is a floor, not a ceiling, on allowable rates of interest in this situation, and that the refusal to allow a higher rate of interest may be a denial of just compensation under the Fifth Amendment. *U.S. v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, State of Mississippi*, (5th Cir. 1983) (*en banc*) 704 F.2d 800. As we remand for a new trial on the issue of the reasonable cost of a substitute facility, we also re-

mand to the district court the question of a proper rate of interest.

Duncanville is a small home rule city of approximately 28,000 people located in the southwest portion of Dallas County, Texas. It operated a sanitary landfill on a tract of approximately 50 acres southwest of the city, along Ballwag Road in Dallas County, near the Tarrant County line. The United States condemned this tract (the Ballwag site) pursuant to the construction of Lakeview Lake, a redundantly named U.S. Army Corps of Engineers flood control project.[1] In accordance with the provisions of the Declaration of Taking Act, the government deposited its estimated value of the condemned property, $199,950.00, into the registry of the Court.[2]

For approximately two years after the taking of the Ballwag site, Duncanville trucked its daily garbage to a landfill near Ferris, Texas, some 22 miles to the southeast. It then acquired a new site of its own in northwest Ellis County (the Ellis County site), approximately the same driving time from Duncanville as the Ballwag site. This site consists of approximately 113.7 acres. Duncanville has been using the Ellis County site since January 1, 1981.

Duncanville demanded a jury trial on the issue of compensation, contending that the amount offered by the government was inadequate because Duncanville was entitled to the reasonable cost of substitute facilities, rather than merely the fair market value of the condemned property. Duncanville asked for the

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[1] The parties stipulated to October 3, 1978, as the date of taking.

[2] This money was redeposited in an interest-bearing bank account and later withdrawn, with the accrued interest, by the City of Duncanville.

cost of the Ellis County land, the costs of permitting and preparation, and the cost of the interim use of the Ferris landfill.

After the presentation of evidence and arguments, the trial judge submitted two special interrogatories to the jury. Special question number one required a finding as to the fair market value of the 50-acre Ballwag site, which the jury fixed at $225,000. Special question number two required a finding as to the cost of supplying a functionally equivalent substitute landfill site, which the jury fixed at $723,654.01. The district court then concluded that as a matter of law the market value of the Ballwag site was the proper measure of compensation and entered judgment for $225,000.00. He set interest on the unpaid balance of $25,050.00 at 6%.[5] Duncanville appeals.

The Fifth Amendment to the U.S. Constitution provides,

> [N]or shall private property be taken for public use, without just compensation.

The issue here is what measure of compensation is "just" when a public entity is obligated to replace its condemned public facility.

In *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania*, (*Lutheran Synod*), 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979), the Supreme Court declined to discuss the precise question presented here. The Court ruled that the payment of fair market value is sufficient compensation to a private nonprofit organization whose property is operated for a public purpose.

[5] This amount, a total of $29,934.75, was deposited in the court's registry on December 29, 1981.

In *Lutheran Synod*, the Court acknowledged that generally an award of fair market value strikes "a fair 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose." 441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 441, *quoting United States v. Tronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402, 70 S.Ct. 217, 221, 94 L.Ed. 195 (1949). Nevertheless, the Court recognized and reaffirmed that fair market value is not and cannot be the single, inflexible measure of just compensation.

> "[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards .... Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 442, *quoting United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950). *See also United States v. 320.0 Acres of Land, More or Less, in the County of Monroe, State of Florida*, 605 F.2d 762, 780-81 (5th Cir. 1979).

The substitute facilities doctrine arose from that realization that "just compensation" and "fair market value" are not always synonymous. Its genesis is in language written by Chief Justice Taft in *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923). In *Brown*, three-quarters of the town of American Falls, Idaho, was to be inun-

dated and destroyed by the waters of a reservoir on the Snake River. In that extreme situation, the Chief Justice observed, "a method of compensation by substitution would seem to be the best means of making the parties whole." 263 U.S. at 83, 44 S.Ct. at 94, 68 L.Ed. at 180.[4]

Generally, the substitute facilities standard has been applied to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined. Numerous cases have recognized and applied this principle. *See, e.g., United States v. Streets, Alleys and Public Ways in Village of Stoutsville, in Monroe County, Missouri*, 531 F.2d 882 (8th Cir. 1976); *County of Sarpy, Nebraska v. United States*, 181 Ct.Cl. 666, 386 F.2d 453 (Ct.Cl. 1967); *United States v. Certain Lands Located in the Townships of Raritan and Woodbridge, Middlesex County, New Jersey*, 246 F.2d 823 (3rd Cir. 1957); *Town of Clarksville, Va. v. United States*, 198 F.2d 238 (4th Cir. 1952); *City of Fort Worth, Tex. v. United States*, 188 F.2d 217 (5th Cir. 1951); *United States v. Los Angeles County, Cal.*, 163 F.2d 124 (9th Cir. 1947); *United States v. Des Moines County, Iowa*, 148 F.2d 448 (8th Cir. 1945); *Jefferson County, Tennessee v. Tennessee Valley Authority*, 146 F.2d 564 (6th Cir. 1945). If no substitute facility is necessary, fair market value will be the standard for compensation,

[4] As Justice Marshall points out in *Lutheran Synod*, 441 U.S. at 509, 99 S.Ct. at 1856, 60 L.Ed.2d at 439, *Brown* addressed the scope of the government's condemnation power. Its reference to subetitution as a proper measure of compensation must be viewed as dictum. Recognizing this, we do not rely upon *Brown* as authority for our decision today, but mention it only for its historical importance.

when it can be ascertained. *See United States v. 3,727.91 Acres of Land, More or Less, in County of Pike, State of Missouri (Ellsberry Drainage District)*, 563 F.2d 357 (8th Cir. 1977); *United States v. Certain Property in Borough of Manhattan, City, County and State of New York*, 403 F.2d 800 (2d Cir. 1968); *State of California v. United States*, 395 F.2d 261 (9th Cir. 1968). Often, however, only nominal damages are justified where streets, highways and the like need not be replaced. *See, e.g., Village of Stoutsville, supra*; *Franklin County, Georgia v. United States*, 341 F.2d 106 (5th Cir. 1965), *State of Washington v. United States*, 214 F.2d 33 (9th Cir. 1954); *Woodville, Okla. v. United States*, 152 F.2d 735 (10th Cir. 1946).

This is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.[5] The United States contends that because fair market value can be ascertained, that value must be the measure of compensation. We conclude, however, that the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property.

Although the indemnity principle which animates the just compensation clause of the Fifth Amendment "has not been given its full and literal force," *Lutheran Synod*, 441 U.S. at 510-11, 99 S.Ct. at 1856-57, 60 L.Ed.2d at 440, it must nevertheless be

[5] That controversy was, of course, settled by the jury. Its finding of $225,000 is somewhat more than the highest figure suggested by the government and considerably less than the lowest figure suggested by Duncanville.

our aim to place a condemnee "in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236, 1244 (1934). *See also 320.0 Acres of Land*, 605 F.2d at 780. The purpose of just compensation is to reimburse the owner/condemnee for the loss he has suffered by the taking of the property.

Duncanville's situation is very different from that of the typical private landowner, or that of the non-profit condemnee in *Lutheran Synod*. As the Supreme Court emphasized,

> [R]espondent [Synod] is under no legal or factual obligation to replace the camps, regardless of their social worth. As a private entity, respondent is free to allocate its resources to serve its own institutional objectives, which may or may not correspond with community needs. Awarding replacement cost on the theory that respondent would continue to operate the camps for a public purpose would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use.

441 U.S. at 515-16, 99 S.Ct. at 1859, 60 L.Ed.2d at 444.

In contrast, in order to continue to provide a necessary public service, Duncanville presumably was required to spend certain monies to purchase a new landfill site and prepare that site for its purpose.*

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*The collection and disposal of garbage by a municipality is a governmental function imposed by law. *City of Fort Worth v. George*, 168 S.W.2d 929 (Tex.Civ.App.—Fort Worth, 1937, *writ ref.*). For the purposes of this appeal, the government does not directly challenge the fact that Duncanville was thereby obligated, either by law or practical necessity, to maintain a sanitary landfill. Solid waste disposal and sanitary landfills are regulated under Tex.Rev.Civ.Stat.Ann. art. 4477-7 (Vernon Supp. 1982).

The decision as to whether substitute facilities are in fact necessary is a question for the trial court. *Wordy v. United States*, 402 F.2d 762, 763 (5th Cir. 1968). Here the court made no finding on the issue, which should be decided on remand. At trial and on appeal, the United States has mentioned testimony to the effect that Fort Worth has been contracting out its garbage collection to private firms. The most that can be said from this mention is that the government is attempting to cast doubt on the necessity for Duncanville to maintain a sanitary landfill. If so, this can be remedied on the hearing on remand.

We remind the trial court that in considering this question, it is not enough for the government to demonstrate a "reasonably adequate" or "reasonably passable" alternative method of garbage collection which does not require city operation of a sanitary landfill. The City is entitled to a facility or method which will dispose of the refuse of its citizens "in an equally adequate manner as would have been true had there been no condemnation." *City of Fort Worth*, 168 F.2d at 221. This necessitates the acknowledgement and consideration of any practical, economic or logistical advantages of the City's operation and control of its own sanitary landfill.

Its loss from the condemnation was the amount of money reasonably spent in that venture to create a functionally equivalent facility. To deny Duncanville reimbursement for its unavoidable loss would be to deny just compensation.

The Second Circuit has reached the same conclusion. *Certain Property in Borough of Manhattan*, *supra*; *United States v. Certain Property in Borough of Brooklyn*, 346 F.2d 690 (2d Cir. 1965). *Certain Property in Borough of Manhattan* is particularly in-

structive. That case dealt with the condemnation by the Post Office Department of a public bath and recreation building owned and operated by New York City. As here, it was agreed that the building had a market value. The City contended that it had a duty to replace the condemned structure and that it was entitled to the cost of the functionally equivalent facility. The United States argued that the City had no legal requirement to replace the building and that in any event market value was the proper standard of compensation.

The Second Circuit, reversing the district court, held for the City. It concluded,

> The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available in public condemnation proceedings. [Citations omitted] When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.
>
> When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. [Citations omitted] The duty may be legally compelled or one which arises from necessity . . . We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of "value" but by the loss to the community occasioned by the condemnation.

403 F.2d at 803-04.

That loss to the community is the cost of providing the necessary substitute facility. As we pointed out in *City of Fort Worth*, where we also rejected a strict view of the meaning of "necessity", "In any proper view of the requirements of just compensation, the substitute 'necessary' is that necessary to readjust [the City's] street and highway system to serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonably practical." 188 F.2d at 222. That view applies as well to the replacement of the landfill condemned here.

In *United States v. State of South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir. 1964), decided before either *Certain Property in Borough of Brooklyn* or *Certain Property in Borough of Manhattan*, the Eight Circuit apparently reached a different conclusion. In that case, the United States had condemned a public park, also in order to build a reservoir. The trial judge, *sua sponte*, submitted a special interrogatory to the jury asking whether the state had an "obligation and need" to establish a substitute state park—a question which the jury answered in the affirmative. The court then awarded the state the cost of a substitute site.

The Eighth Circuit reversed. It held that the special interrogatory had impermissibly submitted a mixed question of law—"obligation"—and fact—"need" to the jury. It concluded moreover that the substitute facility theory was improper because the market value of the condemned property was ascertainable.

We find it unnecessary to determine whether we would follow *South Dakota Game, Fish and Parks*

Department. First, the finding of need was highly suspect in that case. Second, and more significant, in *Ellsberry Drainage District*, *supra*, a more recent case, the Eighth Circuit cited *Certain Property in Borough of Manhattan* and recognized that "[t]he substitute facilities doctrine is not an exception to the fair market value test but merely an alternate means of determining what just compensation is when a public facility is involved." 563 F.2d at 360. In a footnote, the Court observed, "Under the substitute facility doctrine if the structure is reasonably necessary for the public welfare, then the public condemnee is entitled to the cost of constructing a functionally equivalent substitute. However, the key to the application of this doctrine is whether the facility need be replaced." 563 F.2d at 359, n.2.

Considering the peculiarities of *South Dakota Game, Fish and Parks Department*, and in light of *Ellsberry Drainage District*, there is no indication that the Eighth Circuit would reach a result contrary to that which we reach today. If it would reach such a result, by this opinion which creates no conflict we must respectfully disagree, ally ourselves with the Second Circuit and conclude that here the measure of just compensation is the reasonable cost of a functionally equivalent substitute facility.

The trial court held that Duncanville had not met its burden of proving the cost of a functionally equivalent substitute facility and so had forfeited its case on the issue. With this we must disagree. Duncanville submitted evidence of the price of the land and of the expense of preparing the site. Witnesses testified that it was necessary to acquire the entire tract, at that price, in order to avoid more costly severance damage suits. We express no opinion as to the validity

of these contentions, but we consider them sufficient to fulfill Duncanville's burden of presenting a case as to the cost of substitute facilities.[7]

An owner of condemned property "must be made whole but is not entitled to more." *Olson*, 292 U.S. at 255, 54 S.Ct. at 708, 78 L.Ed. at 1244. Accordingly, the district court should at least take into account the comments of the Second Circuit that

> [E]quitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years. With deference to several contrary holdings, we believe the amount should be calculated and an appropriate deduction made. [Footnotes omitted]

403 F.2d at 804.

Here the City of Duncanville has perhaps gained noticeably from the replacement of the Ballwag fill with the new Ellis County site. The Ellis County site comprises 113.7 acres compared with 50 acres at Ballwag, some 15 of which had already been filled.[8] According to uncontradicted testimony, the Ellis

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[7] At trial the government presented evidence as to the actual cost of several "comparable" landfill sites. The record clearly shows that all but one of these sites were much too far from Duncanville to be even hypothetically suitable for use as Duncanville's municipal landfill. The government did not demonstrate that any tracts other than the Ellis County site were available for purchase for landfill use in the Duncanville area.

[8] A portion of the Ballwag acreage was occupied by a creek. At trial there was some dispute as to whether that portion should properly be considered "fillable" acreage.

County site can be filled to a depth of about 30 feet, as opposed to 10 feet at Ballwag. While the Ellis County site is approximately two miles farther away, it is accessible via faster roads. According to testimony, the Ellis County site has a potential life of approximately 41.6 years, while Ballwag was good only for about 12.8 years more. Generally there is disagreement as to the details of the comparative capacities of the two sites. But it is very clear that the Ellis County site is much better in terms of fillable acreage and life-span that Ballwag. In this particular tale of two landfills, Duncanville's garbage might well be heard to say, "It is a far, far better rest I go to, than I have ever known."

Although it recognized that Duncanville might be entitled to the cost of a reasonably necessary substitute facility, the trial court's instruction on special question number two did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill. The judge told the jury:

> As I previously instructed you, fair market value may not be the sole measure of just compensation. The "cost of substitute facilities" is an alternative measure of just compensation in this case. I will now instruct you regarding this measure of just compensation in this case.
>
> The burden is on the City of Duncanville to establish, by a preponderance of the evidence in the case, that the cost of substitute facilities was as much as the City claims. To "establish by a preponderance of the evidence" has been previously defined, and you are directed to refer back to that definition.

> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Simply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

While this instruction fairly set forth the general purpose and meaning of "substitute facilities," we conclude that it was inadequate to enable the jury to make a fair and complete determination of the costs, including consideration of benefits received, of this particular substitute facility. The "reasonable cost" of a "functionally equivalent substitute sanitary landfill" is too brief a standard to ensure that the jury will balance these various positive and negative attributes.* Accordingly, we decline to adopt the jury's

---

* We do not adopt, or impose upon the district court, any particular method for making this determination. One possible approach, however, was suggested by the Second Circuit in *Certain Property Borough of Manhattan*:

> Several formulas are appropriate. The one that appears suitable under the facts in the present case is the mathematical formula: One minus the ratio that the remaining

award of $723,624.01 and remand the case to the district court for a new trial.

Initially we leave the specifics of the charge to the sound discretion of the trial judge. Likewise, we express no opinion as to the merits or pecuniary accuracy of the various costs claimed by Duncanville.[10]

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useful life of the condemned building [landfill] bears to the useful life expectancy of the substitute facility.

618 F.2d at 804, note 11.

[10] Solely for purposes of illustration, we set forth below the list of costs which Duncanville claimed it incurred in the purchase and preparation of the Ellis County site:

1.	Land Cost (Actual)	$ 583,600.00
2.	Relocating Mobil Pipeline (Actual)	282,406.43
3.	Site Preparation (Actual)	12,063.56
4.	Permanent Fencing (Actual)	16,290.52
5.	Off-Site County Road (Actual)	107,288.00
6.	Relocating Stock Pond (Actual—$10,382.50, less $3,500.00)	6,882.50
7.	Engineering Study (Actual)	15,000.00
8.	Soils Investigation (Actual)	6,479.49
9.	Engineering for Soils Inspection of First and Second Cell Areas (Actual)	1,336.39
10.	Engineering for Soils Inspection of Additional Cells 150 Cells @ $700.00 Each (Estimated)	105,000.00
11.	Three (3) Groundwater Monitor Wells and Initial Resistivity Survey (Actual)	6,419.08

We think it wise, however, to mention a few of the expenses for which Duncanville is entitled to compensation. Clearly Duncanville is entitled to reimbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill. Whether the price actually paid is reasonable under the circumstances is for the jury to decide. In addition, Duncanville is entitled to those expenses incurred in using the temporary site at Ferris, over and above those which would have been incurred at Ballwag.

In holding as we do today, we imply no criticism of the able trial judge. He faced several difficult legal issues and gave them careful and thoughtful consideration. His conduct of the trial was judicious and fair throughout. Nevertheless we hold that the reasonable cost of functionally equivalent substitute facilities is the proper measure of compensation here and that the court's instruction to the jury was inadequate to enable it to make a fully informed and intelligent assessment of that cost.

12.	Earth Resistivity Survey for Remaining Portion (Estimated—20 yr. @ $1000/yr.)	20,000.00
13.	Trips to Midlothian and Austin by City Officials in Preparation of Permit	294.93
14.	Attorney Fees Obtaining Permit (Estimated)	1,000.00
15.	Addition Cost—Landfill Operations Ferris vs. Ballwag	76,927.70
16.	Additional Maintenance Cost Trips to Ferris Landfill	25,882.83
17.	Additional Fuel Cost Trips to Ferris Landfill	7,689.11
	TOTAL	$1,276,311.16

Very recently, in *United States v. 329.73 Acres of Land*, *supra*, this Court held *en banc* that the 6% interest rate provided as delay damages by the Declaration of Taking Act "sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency." 704 F.2d at 812. Neither the district court nor the government has undertaken to defend the constitutionality of a 6% interest ceiling. Instead the court held, and the government contends, that the City failed to introduce any evidence of an alterative appropriate interest rate; hence the use of the 6% "floor" is appropriate. The City admits its failure to introduce evidence, but contends that the district court erred in failing to take judicial notice of the prevailing rate of interest on U.S. Government Bills and U.S. Government Notes and Bonds for the time, as shown in Federal Reserve Bulletin No. 10, Volume 64, October, 1978.

In support of its argument that Duncanville's failure to introduce evidence justifies the use of the 6% interest floor, the government cites *United States v. 100 Acres of Land, More or Less in Marin County, State of California* (*Drake's Beach*), 468 F.2d 1261 (9th Cir. 1972) and *United States v. 174.12 Acres of Land, More or Less, in the County of Pierce, State of Washington*, 671 F.2d 313 (9th Cir. 1982). In *Drake's Beach*, as here, the landowner, after the jury had rendered its verdict, moved the trial court to award interest at the prevailing statutory rate, above 6%. The motion was denied and that denial affirmed on appeal. The Ninth Circuit held that the landowner should have presented evidence on the proper rate of interest at trial and that it was "not entitled to another trial to prove additional elements of just compensation which it could have presented during the original trial." 486 F.2d at 1270.

In neither *Drake's Beach* nor *174.12 Acres*, however, was a new trial ordered on the underlying issue of just compensation. Here we remand for a new trial. In light of that fact, and in light of the very recent nature of our *en banc* holding in *329.73 Acres*, we are of the opinion that the City should be allowed to present evidence of the proper rate of interest at trial. As in *329.73 Acres*, we do not attempt to set a formula for the calculation of a proper interest rate; instead we leave that factual determination for remand upon the evidence to be presented. Since the proper interest rate is an element of "just compensation," we consider the determination of that rate to be within the province of the jury as finder of fact. *Wardy*, *supra*; *Drake's Beach*, *supra*."[11]

The Ballwag landfill will soon be, if it has not already been, transmogrified into a muddy lakebed. It leaves behind this lawsuit as a memento to its former life. In that guise, it will linger for some while longer in the federal courts. We regret that we cannot allow it to rest in watery peace, but we conclude that a new trial is necessary to determine what just compensation the City of Duncanville shall receive for its passing.

REVERSED and REMANDED.

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[11] At issue here is the interest to be assessed for the period of time from the date of taking to the date of judgment. This interest rate is not addressed by section 302 of the Federal Courts Improvement Act of 1982, P.L. 97-194, 28 U.S.C. § 1961, which establishes a varying rate for post-judgment interest in federal district court civil cases.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-78-1221-D

UNITED STATES OF AMERICA

v.

50 ACRES OF LAND, MORE OR LESS, SITUATED IN DALLAS COUNTY, STATE OF TEXAS, and THE CITY OF DUNCANVILLE, TEXAS, ET AL., and UNKNOWN OWNERS

[Filed Dec. 9, 1981]

ORDER

Came on for consideration before the Court, Honorable Robert M. Hill, presiding, the motions for judgment filed by the United States of America (Government), plaintiff, and the City of Duncanville (City), defendant. Having considered the motions, the Court is of the opinion that a judgment in the amount of $225,000 plus interest on the amount of the deficiency should be entered.

This is an eminent domain proceeding. The Government has condemned approximately 50 acres of land owned by the City. The Government is seeking to limit the condemnation award to the fair market value as found by the jury. The City, in turn, is

seeking to recover the cost for a substitute facility, an amount as found by the jury substantially in excess of the fair market value of the condemned property. Following a trial on the merits, the jury found the fair market value of the land to be $225,000 and the cost of functionally equivalent substitute facility to be $723,624.01.

Under Rule 71A(h), Fed. R. Civ. P., it is for the Court to decide all issues, factual and legal, other than the precise issue of the amount of compensation to be awarded. *United States v. Reynolds*, 397 U.S. 14, 20 (1970); *United States v. 158.24 Acres of Land in Bee County, Texas*, 515 F.2d 230, 232 (5th Cir. 1975). Thus, it is for the Court to determine which method of calculating just compensation is to be used. *See Reynolds*, 397 U.S. at 20.

The Supreme Court has never ruled on the propriety of substitute-facilities compensation for public condemnees. *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania*, 441 U.S. 506, 509 n.3 (1979). In *564.54 Acres*, the Supreme Court held that substitute-facilities compensation was not available to a private condemnee, and that allowing the condemnee the fair market value of its property is consistent with the basic equitable principles of fairness underlying the just compensation clause of the Fifth Amendment. *Id.* at 516-17.

The Court is of the opinion that fair market value is the appropriate measure of compensation in this action. The 50 acres of land condemned by the Government had been used by the City as a sanitary landfill. The City presented evidence on the costs it had incurred as a result of purchasing substitute land to be used as a landfill, as well as interim costs it had

incurred for garbage disposal while a new site was being located and purchased. However, the City purchased a much larger tract of land than was condemned and the evidence indicated that they paid a premium for this tract. There was no evidence presented of any attempts by the City to acquire any other tracts of land. The evidence also showed that part of the condemned land had already been used to dump waste. The City failed to establish how this would effect the value of a functionally equivalent substitute facility. The City did not meet its burden of establishing what would be a reasonable cost of a substitute facility.

The City contends that the acquisition of permits for a sanitary landfill are difficult to obtain and there are only a limited number of areas for which permits can be obtained, so that the buying and selling of landfill properties on the open market in other areas would not be relevant to the City's ability to acquire a substitute facility. The jury was specifically instructed to determine the reasonable cost of a functionally equivalent substitute landfill, and the City urges that the combination of these two factors supports the jury finding.

Assuming the City's assertion that the jury finding is supportable, the fair market-value standard should still be applied. The normal rule for calculating just compensation is to award the condemnee the fair market value of the condemned property. *564.54 Acres*, 441 U.S. at 511. This standard provides a relatively objective working rule that generally strikes a fair balance between the public's need and the claimant's loss upon condemnation for a public purpose. *Id.* at 511-12. Fair market value, however, is not an absolute standard nor an exclusive method of

valuation. *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). There are recognized situations in which the normal rules for calculating just compensation are suspended. The Court must determine whether application of the fair-market-value standard under the facts of this action would be impracticable or whether an award of market value would diverge so substantially from the principle of indemnity as to violate the Fifth Amendment. *564.54 Acres*, 441 U.S. at 513. Only when fair market value cannot be determined or would provide inadequate compensation are other measures of value appropriate. *United States v. 3,727.91 Acres of Land*, 563 F.2d 357, 361 (8th Cir. 1977).

The instances in which market value is too difficult to ascertain generally involve property such as roads or sewers, where there is either no market or the property is so infrequently traded that the price obtained in a prior sale would not be representative of the price a sale of the condemned property would bring. *Id.* The vast majority of cases that have utilized the substitute facilities measure of compensation have involved property of this kind. *See, e.g., Copen[illegible] v. United States*, 577 F.2d 113 (10th Cir. 1978) (alleyway); *3,727.91 Acres*, 563 F.2d 359 (levees and ditches); *United States v. Streets, Alleys and Public Ways in the Village of Steubenville*, 531 F.2d 862 (6th Cir. 1976) (streets and alleys); *Franklin County, Georgia v. United States*, 341 F.2d 107 (5th Cir. 1965) (per curiam) (road and bridge); *State of Washington v. United States*, 214 F.2d 53 (9th Cir. 1954) (highway); *Clarksville v. United States*, 198 F.2d 228 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953) (sewer system); *City of Fort Worth v. United States*, 150 F.2d 217 (5th Cir. 1951) (street).

A few cases have extended the application of the substitute facilities measure of compensation to other property deemed reasonably necessary to the public welfare. *See, e.g., United States v. Certain Property Located in the Borough of Manhattan, City, County and State of New York*, 403 F.2d 800 (2d Cir. 1968) (public bath and recreation center); *United States v. Certain Land in the Borough of Brooklyn*, 346 F.2d 690 (2d Cir. 1965) (playground); *United States v. Certain Land in the City of Redbluff*, 192 F.Supp. 725 (N.D. Cal. 1961) (parking lot). The test applied in cases utilizing the substitute facilities measure is whether the condemnee is under a factual or legal obligation to replace the facilities. *E.g. Streets Alleys and Public Ways*, 531 F.2d at 886; *Borough of Manhattan*, 403 F.2d at 803. *See also 564.54 Acres*, 441 U.S. at 515.

The Court is of the view that substitute facilities compensation should not be awarded in every case where a public condemnee can establish a duty to replace the condemned property, at least where a fair market value can be established. When the doctrine of cost of substitute facilities is applied, a windfall *necessarily* accrues to the condemnee who is awarded an amount sufficient to replace ancient or depleted facilities with brand new facilities. *Id.* at 517 (Justice White concurring). *See also 564.54 Acres*, 576 F.2d 983, 996-1000 (3d Cir. 1978) (Judge Stern concurring). By definition, a market value represents approximately what it would cost to purchase the same or similar property in the marketplace. If the public condemnee receives the market value of its property, it is difficult to perceive how such an award "would impermissibly deviate from the indemnity principle." *564.56 Acres*, 441 U.S. at 514. As Justice White remarked:

> Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer. This is true with respect to the condemnation of any facility, whether or not there is an obligation to reproduce it, and I had not understood the Just Compensation Clause to guarantee subsidies to either private or public projects. Similarly, if more demanding building codes or other regulations will enhance the cost of replacement, it is reasonable to assume that compliance itself will be of some benefit to the owner and hence need not be financed by the condemnor.

Id. at 518 (Justice White concurring).

The evidence clearly established that there had been a sufficient number of comparable sales from which a fair market value for the 50 Acres involved in this action could be determined. The jury finding that $225,000 was the fair market value of the tract in question is amply supported by the evidence. The Court is of the opinion that an award representing the fair market value of the tract does not impermissibly deviate from the indemnity principle; the City is placed in as good a position pecuniarily as if its property had not been taken. The basic principle of just compensation is that the condemnee must be made whole but is not entitled to more. *Olson v. United States*, 292 U.S. 246, 255 (1934). This principle is satisfied by awarding the City the fair market value of the property taken by the Government.

A final issue involves the rate of interest to be awarded on the difference between the condemnation award and the amount deposited with the Court as estimated compensation. The Declaration of Taking

Act, 40 U.S.C. § 258a (1970), specifically provides that the judgment on a declaration of taking

> shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of the taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court . . . .

In this action, there was a deficiency in the estimated compensation paid into the Court of $25,050.

The Fifth Amendment requires the payment of interest as an element of just compensation where the date of taking of the property precedes the payment of the award. *United States v. Miller*, 317 U.S. 369, 381 (1943); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923); *United States v. 5.00 Acres of Land*, 507 F.Supp. 589, 598 (E.D. Tex. 1981). Just compensation requires payment of "the full equivalent of the value of the [property] . . . paid contemporaneously with the taking." *Phelps v. United States*, 274 U.S. 341, 344 (1927).

The City argues that a rate of interest on the deficiency of only six percent contravenes the Fifth Amendment because of the disparity between the six percent figure and the market rate of interest, so that the City is not receiving the full equivalent for its property. It has been held that the six percent rate provided for in the Act operates only as a floor in computing just compensation and cannot be viewed as a ceiling on the rate of interest allowable. *United States v. Blankinship*, 545 F.2d 1272, 1276 (9th Cir. 1976); *5.00 Acres of Land*, 507 F.Supp. at 598-99. *Accord, Miller v. United States*, 620 F.2d 812, 837-

39 (Ct. Cl. 1980); *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464-65 (9th Cir. 1980); *United States v. 97.19 Acres*, 511 F.Supp. 565, 567-69 (D. Md. 1981); *United States v. 319.46 Acres of Land*, 508 F.Supp. 288, 290-91 (W.D. Okla. 1981).

Assuming the principle enunciated in these cases is a sound one, the difficulty arises in calculating a rate of interest to be applied. There is a strong judicial policy in favor of the establishment of a uniform rate of interest applicable in condemnation cases in order to avoid discrimination among litigants. *Miller*, 620 F.2d at 838. The cases have utilized a variety of methods to calculate the interest rate to be applied. *Cf. 97.19 Acres*, 511 F.Supp. at 569 (long-term corporate rate for Aaa bonds for each individual year from date of taking to date of payment); *319.46 Acres*, 508 F.Supp. at 290 (selection of governmental and private securities with varying lengths of maturity, interest rates averaged throughout the period of the deficiency); *5.00 Acres*, 507 F.Supp. at 599 (interest rate applicable to three-year Treasury bonds purchased on date of taking). Assuming that a proper formula could be determined, the City presented no evidence from which to calculate the applicable interest rate.[1] Therefore, the Court is of the opinion that a six percent interest rate should be applied to the amount of the deficiency. *See Pitcairn v. United States*, 547 F.2d 1106, 1130 (Ct. Cl. 1977) (Judge Skelton, concurring in part and dissenting in part).

---

[1] Apparently, other courts have simply taken judicial notice of such publications as the Treasury Bulletin, the Federal Reserve Bulletin and Moody's Composite Index of Yield on Long Term Corporate Bonds. *See e.g., Miller*, 620 F.2d at 849; *97.19 Acres*, 511 F.Supp. at 569; *5.00 Acres*, 507 F.Supp. at 599.

Accordingly, it is ORDERED that the motion for judgment filed by the United States of America is granted, the motion for judgment filed by the City of Duncanville, Texas, is denied, and judgment in accordance with this Order be entered.

Dated this 9 day of December, 1981.

/s/ Robert Hill
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1615

D.C. Docket No. CA-3-78-1221-D

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

50 ACRES OF LAND, ETC., ET AL., DEFENDANTS

THE CITY OF DUNCANVILLE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Texas

Before BROWN and JOLLY, Circuit Judges, and MAHON *, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

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* District Judge of the Northern District of Texas, sitting by designation.

judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 13, 1983

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1615

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

50 ACRES OF LAND, ETC., ET AL., DEFENDANTS

THE CITY OF DUNCANVILLE, DEFENDANT-APPELLANT

[Filed Sep. 19, 1983]

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 13, 1983, 5 Cir., 198—, —— F.2d ——)

(September 19, 1983)

Before BROWN and JOLLY, Circuit Judges, and MAHON *, District Judge.

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* District Judge of the Northern District of Texas, sitting by designation.

PER CURIAM:

(XX) The Petition for Rehearing filed by the City of Duncanville, Texas is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc filed by the Government is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John R. Brown
United States Circuit Judge

REHG-6

[illegible]

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
FEB 18 1994
ALEXANDER L. STEVAS,
CLERK

No. 93-1170

In The

Supreme Court of the United States

October Term, 1993

United States of America,

Petitioner,

v.

50 Acres of Land, etc. and the City of Duncanville, Texas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF DUNCANVILLE, TEXAS IN OPPOSITION

Counsel of Record for Respondent

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Circuit Court correctly applied the reasonable cost of substitute facilities as the measure of damages under the *Just Compensation* Clause where the public facility of the City had been condemned by the United States, and where the City was obligated to and had replaced the condemned public facility.

LISTING OF PARTIES

Petitioner:

UNITED STATES OF AMERICA

Respondent:

30 ACRES OF LAND, etc and the CITY OF DUNCANVILLE, TEXAS

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In The

Supreme Court of the United States

October Term, 1983

No. 83-1170

United States of America,

Petitioner,

v.

50 Acres of Land, etc. and the City of Duncanville, Texas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF DUNCANVILLE, TEXAS IN OPPOSITION

WHY THE WRIT SHOULD NOT BE GRANTED

We recognize that the Court of Appeals has decided a question arising under the Just Compensation Clause that this Court expressly reserved in *United States v. 564.54 Acres of Land*, 441 U. S. 506, 509 n. 3, 515 (1979) (Lutheran Synod). We disagree with Petitioner's contention that the decision below is contrary to the general principles governing determination of just compensation that have been developed by this Court. Since this Court has not ruled upon the question, the decision below could not be contrary to the general principles determined by this Court.

It is contended that the decision of the Court below is contrary to the 8th Circuit's decision in *United States v. South Dakota Game, Fish and Parks Department*, 329 F.2d 663 (1964). We respectfully submit that under the facts in that case the decision is not contrary to the decision of the Court below in the present case. In the *South Dakota* case the condemnee had not been required to acquire nor had the condemnee acquired substitute facilities as has been acquired by the City of Dunnanville in this case.

It is undisputed in this case that the City of Dunnanville was obligated to acquire another landfill site, that it did acquire another landfill site and in doing so either expended or obligated itself to expend the sum of One Million Two Hundred Seventy-six Thousand Three Hundred Eleven Dollars and Seventy-six Cents ($1,276,311.76). After considering the amount of land acquired by the City of Dunnanville, and the useful life of both the old and new landfill sites, the jury found that the reasonable cost of acquiring a reasonably adequate substitute facility was the sum of Seven Hundred Twenty-three Thousand Six Hundred Fifty-four Dollars and One Cent ($723,654.01). In other words the jury found that the City was entitled to recover only $723,654.01, which was Five Hundred Fifty-two Thousand Six Hundred Fifty-seven Dollars and Seventy-five Cents ($552,657.75) less than the amount expended by the City.

These facts substantially distinguish the present case from the *South Dakota Game, Fish and Parks Department* case, *supra*.

Although there was evidence that the old landfill site owned by the City of Dunnanville had a market value, there is no evidence in the record that the City of Dunnanville could have gone out and acquired a reasonably located landfill site for less than they paid for the substitute facility acquired by the City.

The Government is concerned about the City getting a windfall profit out of this transaction. It is undisputed that the City of Dunnanville will have expended more than Five Hundred Fifty-two Thousand Dollars ($552,000.00) in acquiring the substitute facility, in addition to the amount which the jury determined to be the reasonable cost of a reasonably adequate substitute facility. Certainly there is no windfall to the City under these circumstances.

This Court in the *Lutheran Synod case*, *supra*, has stated that this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U. S. 246, 255, 78 L.Ed. 1236, 54 S. Ct. 704 (1934).

If the just compensation requirement of the Fifth Amendment requires that the owner of condemned property be put in as good a position pecuniarily as if his property had not been taken, then it cannot be seriously contended that awarding only market value of the land being condemned would be just compensation. Awarding to the City the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00) which the jury found to be the fair market value of the property taken, cannot place the City in as good a position pecuniarily as if its property had not been taken, where the City has either expended or obligated itself to expend One Million Two Hundred Seventy-six Thousand Dollars ($1,276,000.00), and where the jury found that the sum of Seven Hundred Twenty-three Thousand Six Hundred Fifty-four Dollars and One Cent ($723,654.01) was the reasonable cost of providing reasonably adequate substitute facilities.

The opinion of the Court below refers to several cases in other circuits where the Courts have held that the reasonable cost of substitute facilities is the proper measure of damages in arriving at just compensation, even where there may be a market value of the property being condemned.

We respectfully submit that the Court below correctly held that under the facts in this case the reasonable cost of substitute facilities was the proper measure of damages in order to arrive at just compensation. Based upon the facts in this case this was a correct decision.

Petitioner cited no case, nor have we found a case, where any Court has held that the cost of substitute facilities is not the proper measure of damages in arriving at just compensation where the condemnee was obligated to replace the public facility and had actually expended its funds in so doing.

CONCLUSION

We respectfully submit that there is no conflict, under the facts, between the decision of the Court below and the decision by the Eighth Circuit in *United States v. South Dakota Game, Fish and Parks Department*, *supra*. Nor is there any conflict between the decision of the Court below and any other court where the public facility had been replaced by the condemnee.

Since the decision of the Court below in holding that the cost of substitute facilities was the proper measure of damages in arriving at just compensation under the facts in this case, and such a decision was correct, the Petition for Writ of Certiorari filed by the United States should be denied.

Respectfully submitted,

Baker, Jaye, Sullivan & Nichols

By _____
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14995000

Attorneys for Respondent

REPLY

BRIEF

Office - Supreme Court, U.S.
FILED
FEB 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1170

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE
CITY OF DUNCANVILLE, TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1170

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE
CITY OF DUNCANVILLE, TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

The response to our Petition occasions only the briefest of replies:

1. Respondent asserts (Br. in Opp. 2) that the decision below does not conflict with *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir. 1964), explaining that in that case "the condemnee had not been required to acquire nor had the condemnee acquired substitute facilities" (Br. in Opp. 2). The Eighth Circuit's opinion belies the attempted distinction, for it reflects (329 F.2d at 668) that the jury had answered in the affirmative the following interrogatory:

> "Do you find that there is an obligation and need for the State of South Dakota, Department of Game, Fish and Parks, to establish a substitute state park for [the parkland property taken by the United States]?"

We note that the court of appeals did not attempt to distinguish *South Dakota Game, Fish and Parks Department* on the ground suggested by respondent.[1] Conversely, respondent does not defend the different distinctions drawn by the court below, which are untenable for the reasons outlined in our petition (Pet. 20-23 & nn.11-12).

2. In our Petition (at 15-17) we noted that the court of appeals did not purport to determine that "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment" (*United States* v. *564.54 Acres of Land*, 441 U.S. 506, 513 (1979)). Respondent does not quarrel with our characterization of the court of appeals' analysis. Rather, respondent appears to suggest (Br. in Opp. 3) that such a determination could have been made based upon the disparity between the total amount it allegedly will spend on its substitute landfill and the amount the jury found to be the fair market value of the property taken. But this argument simply ignores the evidence, recognized by the courts below, that the new landfill site was substantially more valuable than the old one and may have been purchased at a price above its market value (Pet. App. 13a-14a, 21a-22a). Similarly, respondent's effort to demonstrate the inadequacy of fair market value compensation by comparing the verdict returned under that standard to the jury's alternative verdict founders upon the court of appeals' conclusion that the district court's instructions on the substitute facilities costs

[1]Rather, the court below recognized that a finding that replacement was required had been made there (Pet. App. 11a), suggesting only that "the finding of need was highly suspect" (*id.* at 13a).

measure of compensation failed adequately to ensure that the jury adjusted the award to reflect those factors (see Pet. App. 14a-17a).[2]

Finally, respondent appears to suggest (Br. in Opp. 2-3) that the market value of the property taken diverges from the market value of a reasonably comparable substitute facility. But this suggestion challenges the finding of the courts below (Pet. App. 7a, 24a-25a) that a meaningful and representative market value could be ascertained for the property taken. Respondent's argument therefore does not support the court of appeals' analysis, which directs a departure from the fair market value measure of compensation even though the court concluded that fair market value could accurately be determined (compare Pet. App. 7a with *id.* at 6a; see also *id.* at 23a).

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1984

[2]Respondent does challenge the court of appeals' conclusion on this point. Of course, respondent has argued in its own Petition, No. 83-714, that the court of appeals' ruling was foreclosed as a procedural matter. But the scope of the issue in No. 83-714 does not include the substantive correctness of the court of appeals' ruling remanding the case for retrial under modified instructions on the substitute facilities costs measure of compensation.

DOJ-1984-02

PETITIONER'S

BRIEF

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CLERK

No. 83-1170

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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39 pp

QUESTION PRESENTED

Whether, when the United States exercises its power of eminent domain to take property owned by a state or local government entity, the Just Compensation Clause requires payment of compensation measured by reference to the cost of acquiring a substitute facility, rather than the usual fair market value standard, in a case where the fair market value of the condemned property is reasonably ascertainable.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1170

UNITED STATES OF AMERICA, PETITIONER

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 706 F.2d 1356. The district court's opinion (Pet. App. 20a-28a) is reported at 529 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on June 13, 1983. An order denying timely petitions for rehearing (Pet. App.

31a-32a) was entered on September 19, 1983. On December 8, 1983, Justice White extended the time for filing a petition for a writ of certiorari through January 17, 1984. The petition was filed on January 16, 1984, and was granted on March 19, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

1. The United States commenced this action in the United States District Court for the Northern District of Texas by filing a complaint in condemnation, coupled with a declaration of taking, pursuant to 40 U.S.C. 258a, on October 3, 1978. The site acquired was a 50-acre sanitary landfill, owned by respondent, the City of Duncanville, Texas, that it used for the purpose of disposal of regular garbage collections. The site was needed by the United States to accommodate the United States Army Corps of Engineers Lakeview Lake flood control project (subsequently renamed the Joe Pool Lake Flood control project). As estimated compensation, the United States paid $199,950 into the registry of the court, which was subsequently paid over to respondent. Pet. App. 3a & n.2.[1]

The landfill site had been operated by respondent for that purpose since 1969; since 1977, the City had

[1] The operation of 40 U.S.C. 258a is described in *Kirby Forest Industries, Inc.* v. *United States*, No. 82-1994 (Feb. 22, 1984), slip op. 2-3.

operated its landfill under a state permit (Tr. 69-71). At the date of taking, approximately 15 acres of respondent's landfill had been filled with waste and approximately five acres of the total area were unusable for landfill because of the presence of a creek (Pet. App. 13a & n.8; Tr. 85). Approximately 313,000 cubic yards of the landfill's capacity had been used, and the remaining capacity was 650,000 cubic yards, an amount that gave it an expected remaining life of 12.8 years (Pet. App. 14a; Tr. 383-388, 398). Immediately adjacent to respondent's landfill was a privately owned landfill on a 64.28 acre tract, which had also been acquired by the United States (Tr. 211-213, 345, 352).

Following the United States' acquisition of respondent's landfill site, respondent acquired a new landfill facility, consisting of 113.7 acres, at a location approximately the same driving time from Duncanville as the prior facility. According to the uncontradicted trial testimony of an expert geologist, more favorable soil and water-table conditions at the new site made it a better landfill location than the former site; the new site could be excavated to a depth of 20 feet, twice the usable depth of the former landfill. The usable capacity of respondent's new site was 2,100,000 cubic yards, giving it an expected lifetime of 41.6 years. The residual capacity of the former site thus was only 38.8% of the capacity of the replacement landfill. Pet. App. 3a, 13a-14a; Tr. 397-399.

2. a. Prior to trial, a dispute emerged between the parties as to the proper measure of just compensation. The government contended that fair market value was the applicable standard; respondent maintained that it was entitled to recover the entire sum expended in acquiring, improving and putting into operation its substitute facility, which, it claimed,

amounted to over $1,276,000 (see Pet. App. 16a-17a n.10). In order to resolve this dispute as to the proper measure of compensation, the government filed a motion in limine, requesting that the court limit the evidence to be received at trial to evidence relating to the fair market value of the property, and exclude all evidence as to the cost of reproducing the property taken or acquiring a substitute facility (R. 62-79). This motion was denied (R. 111), the district court noting that in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 509 n.3 (1979) (*Lutheran Synod*), this Court had reserved the question whether a substitute facilities measure of compensation is appropriate when publicly owned property is taken. The district court reasoned that "a complete factual record should be developed from which an independent determination of the appropriate measure of compensation can be made" (R. 111).

b. The issue of just compensation was then tried to a jury. Both parties presented testimony as to the fair market value of the property taken. Appraisers who testified for the government and those testifying for respondent agreed that a distinct market existed for landfill properties in the vicinity of Duncanville, and that the fair market value of the condemned site was readily ascertainable by reference to sales of other, comparable, landfill properties in the area. See Pet. App. 7a, 25a.[2]

[2] The government's witnesses all testified that a market for landfills existed in the area, and testified to fair market value appraisals of respondent's landfill site ranging from $160,410 to $190,000, based upon comparable sales data (Tr. 208, 218-229, 249-250, 276, 295-297, 298-310, 345-353, 360). Appraisers Carl Mash and R. Edwin White, who testified for respondent, agreed that a market existed for landfill properties in the

In addition, over the government's continuing objection (R. 151-152), respondent presented the testimony of Robert B. Lee, Duncanville's Director of Public Works, that the aggregate cost of acquisition and preparation of the substitute landfill site established by the City was $1,276,311.76 (Tr. 78). Lee's testimony indicated that although respondent has the power of eminent domain, it did not attempt to acquire a landfill site comparable in size to its former site, and that respondent did not have the new landfill site it purchased appraised prior to making its negotiated purchase and did not bargain with the vendor over the price (Tr. 91-94). The testimony of the government's appraisers indicated that the amount paid by respondent to purchase its substitute site was substantially in excess of the fair market value of that site (Tr. 273, 282, 319-321, 357). The United States moved to strike Lee's testimony, on the ground that it was not probative of the value of a reasonably necessary substitute facility (Tr. 433-434). The court denied the government's motion (Tr. 435).

c. At the close of the evidence, the district court submitted the case to the jury, directing the jury to respond to special questions. Through these questions, the jury was asked to determine both the fair market value of respondent's landfill on the date of taking, and the cost to respondent of establishing a substitute sanitary landfill.[3] The government ob-

area, and, based upon sales they deemed comparable, offered valuation appraisals of $370,000 and $367,583, respectively (Tr. 140, 173-178, 182, 189-190).

[3] The substitute facilities measure of compensation was defined for the jury as follows (Pet. App. 15a):

> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its

jected unsuccessfully to submission of the substitute facilities issue to the jury (Tr. 499-500; see also R. 151-152), while respondent objected unsuccessfully to submission of the fair market value question (Tr. 499-500). The jury returned a verdict of $225,000 based upon the fair market value standard, and an alternative verdict of $723,654.01 as the cost of substitute facilities (Pet. App. 4a).

d. Each party then moved for entry of judgment based upon the verdict reflecting the measure of compensation it had advocated (R. 203, 223). The district court ruled in the government's favor, entering judgment against the United States in the amount of the fair market value of the property taken, as determined by the jury ($225,000), plus interest due upon the deficiency in the estimated compensation previously paid by the United States, at the rate of 6%.[4]

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public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.

Simply stated, the cost of subetitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

[4] The district court assumed that, as respondent contended, the 6% interest rate on such deficiencies prescribed by the Declaration of Taking Act, 40 U.S.C. 258a, must be regarded as a floor, rather than a ceiling on the interest to be awarded, lest the discrepancy between the statutory rate and a market interest rate render the statute unconstitutional (Pet. App. 26a-27a). See *Kirby Forest Industries, Inc.* v. *United States*, slip op. 9 n.16. But because respondent had presented no evi-

The district court held, initially, that respondent "did not meet its burden of establishing what would be a reasonable cost of a substitute facility" (Pet. App. 22a). The court noted that respondent's evidence reflected only its actual costs in acquiring and developing its new landfill site, which was much larger than the facility being replaced, and had more unused capacity. The court also suggested that the evidence indicated that the purchase price paid by respondent was excessive. Pet. App. 21a-22a.

The district court further held that, even if the evidence supported a finding as to the reasonable cost of an equivalent facility, the fair market value standard was the proper measure of just compensation, where, as here, a market for property of the kind taken exists, and the market value of the property taken is ascertainable (Pet. App. 22a-25a). Noting that fair market value is ordinarily the proper measure of compensation, the court found that neither of the exceptions to that rule recognized by this Court in *Lutheran Synod*, 441 U.S. at 513, was applicable (Pet. App. 23a-25a). The court observed, first, that here, unlike cases involving the taking of streets or sewers or other local government property for which no market exists, or for which the market is so thin as to make comparable sales data unreliable, the record established that a fair market value was readily ascertainable for the property taken (*ibid.*). Second, the court determined that compensation based upon fair market value placed respondent "in as good a position pecuniarily as if its property had not been taken" and that an award based upon fair mar-

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dence from which an appropriate interest rate could be determined, the court declined to award interest in excess of the statutory rate (*id.* at 27a). See pages 10-11, note 6, *infra*.

ket value accordingly "does not impermissibly deviate from the indemnity principle" (*id.* at 25a). The court also noted that the fair market value standard is a desirable one because it provides a relatively objective measure of compensation due (*id.* at 22a).

3. a. The court of appeals reversed and remanded for further proceedings (Pet. App. 1a-19a). The court of appeals recognized that this Court's decision in *Lutheran Synod* left open the questions whether, and in what circumstances, the usual fair market value measure of compensation may be superseded by a substitute facilities cost measure when publicly owned property is taken (Pet. App. 4a). The court also recognized that the substitute facilities doctrine generally has been applied to taking of "streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined" (*id.* at 6a). And the court acknowledged (*id.* at 7a (footnote omitted)) that

> [t]his is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.

Nevertheless, the court of appeals concluded that "the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public facility is obligated to replace the condemned property" (Pet. App. 7a). Reasoning from the "indemnity principle" underlying the Fifth Amendment Just Compensation Clause, the Court concluded that respondent would not be made whole unless reimbursed for "the amount of money reasonably spent in [its] venture to create a functionally equivalent facility" that it was obliged to establish (Pet. App. 9a).[*] (The court of appeals assumed for the purpose of its analysis that replacement of respondent's landfill facility was either a legal or practical necessity, but left open for consideration on remand the question whether this was, in fact, so (Pet. App. 8a-9a & n.6).

b. The court of appeals also rejected the district court's alternative holding that respondent had not met its burden of proving the cost of a functionally equivalent substitute facility. By presenting testimony as to the cost of acquiring and developing its substitute site, and testimony that the entirety of the substitute site had been acquired in order to avoid severance damage claims that respondent believed would be costly, respondent had met its burden of going forward with evidence of the cost of substitute facilities, the court held. Pet. App. 12a-13a.

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[*] The court of appeals recognized (Pet. App. 11a) that in *United States* v. *South Dakota Game, Fish & Parks Dep't*, 329 F.2d 665 (8th Cir.), cert. denied, 379 U.S. 900 (1964), the Eighth Circuit had "apparently reached a different conclusion," holding that the cost of substitute facilities was an improper measure of compensation for the taking of publicly owned property where the market value of that property was ascertainable. But the court below insisted that its decision "creates no conflict" because it believed that the district court's finding in *South Dakota Game, Fish & Parks Dep't* that it was necessary to replace the property taken there, was "highly suspect" (Pet. App. 12a). In addition, the court below believed that language in an intervening Eighth Circuit decision, *United States* v. *3,727.91 Acres of Land*, 563 F.2d 357, 359 n.2, 360 (1977) (*Elsberry Drainage District*), cast doubt upon the Eighth Circuit's continued adherence to the rule reflected in its earlier decision (Pet. App. 12a). (For the reasons stated in our petition at pages 20-23, we believe that the court of appeals' attempt to reconcile its decision with Eighth Circuit precedent is unsuccessful.)

Nevertheless, the court of appeals did not direct entry of judgment based upon the jury's alternative verdict of $725,654.01. The court observed that the substitute site acquired by respondent was substantially larger in area than the facility replaced and was usable to a greater depth. The substitute site accordingly could be expected to serve respondent for a far longer time than its former site, which had been acquired by the government. The court of appeals concluded that the district court's instructions defining the substitute facilities measure of compensation (see page 5 note 2, *supra*) "did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (Pet. App. 14a) and that a remand for retrial under proper instructions accordingly was required. The precise manner in which such a deduction was to be made was left open for determination on remand (*id.* at 16a).[6] The court stated that respondent "is en-

[6] The court suggested that one permissible method of making this adjustment would be to deduct from the cost of substitute facilities a fraction of the total equal to "'one minus the ratio that the remaining useful life of the condemned [property] bears to the useful life expectancy of the substitute facility'" (Pet. App. 15a n.9, quoting *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 n.11 (2d Cir. 1968)).

Also remanded for redetermination was the question of the interest rate to be paid upon any deficiency ultimately determined to be due. The court of appeals reasoned that, because a remand was in any event necessary, respondent should be allowed another opportunity to present evidence on the interest issue (Pet. App. 18a-19a). Applying its prior decision in *United States* v. *233.73 Acres of Land*, 704 F.2d 930, 932 (1983) (en banc), the panel also ruled that interest was not to be limited to the 6% rate specified in the Declaration of Taking Act. See *Kirby Forest Industries, Inc.* v. *United States*, slip op. 9 n.16; compare pages 5-6 note 4, *supra*. And reasoning that "the proper interest rate is an element of 'just

titled to reimbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill" (*id.* at 17a). The court cautioned that "[w]hether the price actually paid [by respondent for its new site] is reasonable under the circumstances is for the jury to decide" (*ibid.*).[7]

SUMMARY OF ARGUMENT

A. In giving content to the just compensation requirement of the Fifth Amendment, this Court has started from the precept that the owner of condemned property should, in general, be left in as good a position pecuniarily as if his property had not been taken. However, this principle of indemnity has never been given full and literal force. Because of serious practical difficulties in assessing the value an owner places on property at a given time, the Court has recognized the need for a relatively objective working rule. The Court accordingly has fashioned the concept of fair market value to determine compensation due to the condemnee. And the Court has repeatedly emphasized that the fair market value standard fulfills the constitutional requirement of just compensation even when such an award does not compensate for all values an owner

compensation,'" the court of appeals directed that the interest rate issue be submitted to the jury upon remand (Pet. App. 19a).

[7] This Court has declined to review respondent's contention that the court of appeals committed procedural error by remanding the case for a new trial rather than directing entry of judgment upon the jury's alternative verdict. *City of Duncanville* v. *United States*, No. 83-714 (cert. denied Feb. 21, 1984).

may derive from his property or otherwise fails to achieve perfect indemnification. This Court's decisions establish, moreover, that there are only two situations where an alternative measure of just compensation must be employed: when market value cannot reasonably be ascertained or when application of the market value standard would result in manifest injustice to the owner or the public.

B. The decision below is irreconcilable with this Court's teaching that fair market value affords just compensation save in two unusual situations. The court of appeals failed to understand that the goal of indemnification is to be pursued through objective working rules that can be administered by the courts. And it plainly did not find that either of the two situations that justify a departure from the fair market value measure of compensation is presented here. Nor would any such determination be permissible in this case.

1. First, as in *Lutheran Synod*, the record reflects that the fair market value of respondent's landfill is ascertainable by reference to comparable sales. Practical necessity accordingly provides no basis for a departure from the settled constitutional measure of just compensation. Moreover, as the court of appeals acknowledged, because the fair market value standard is workable here, unlike cases involving federal acquisition of streets or alleyways that have no ascertainable market value, this case does not present the circumstances that the lower courts typically have found sufficient to warrant recourse to an alternative to the fair market value standard—*i.e.*, the substitute facilities doctrine.

2. Nor did the court of appeals even purport to find that an award of market value would produce

injustice or depart significantly from the indemnity principle here. Indeed, the court of appeals left undisturbed the district court's determination that an award of market value would place respondent in as good a position pecuniarily as if its property had not been taken.

The fact that respondent may be required (by law or practical necessity) to replace its facility does not set respondent apart from private condemnees or render the fair market value standard of compensation inappropriate here. The actual replacement needs and costs of private condemnees have never been considered relevant to determining just compensation, and no reason appears to treat public condemnees differently. Moreover, the market value principle operates even-handedly with respect to public condemnees, mandating payment of compensation gauged by the market value of the property taken, irrespective of whether that amount is more or less than the actual substitution costs borne by the condemnee, if any.

The court of appeals' decision also appears to rest upon the unexplained and erroneous assumption that the fair market value measure of just compensation diverges in principle from a substitute facilities cost measure—even if the latter is tempered to avoid windfalls to the condemnee by limiting it to the reasonable cost of a functionally equivalent facility. That assumption, however, is inconsistent with the very definition this Court has given the fair market value standard: "what a willing buyer would pay in cash to a willing seller" (*United States* v. *Miller*, 317 U.S. 369, 374 (1943)). The reasonable cost of a functionally equivalent substitute facility generally should not be greater than what a willing buyer would pay a like-minded seller, provided that a mar-

ket exists for property of the kind taken, as it does in this case. This is especially so when the condemnee is itself a governmental body, vested, as such bodies typically are—and respondent is—with the power of eminent domain. Respondent's eminent domain authority protects it from paying an exorbitant price in the market place for a substitute facility, and enables it to acquire whatever interest and quantum of property it deems appropriate in establishing a substitute site. Moreover, because a public condemnee need not, under the Fifth and Fourteenth Amendments, itself pay more than fair market value to acquire a substitute site, no different measure of compensation need be afforded to such a condemnee. A substitute facilities measure, to the extent it diverges from the ascertainable fair market value of the property taken, thus confers a windfall upon the public condemnee.

C. The very adjustments to the cost of substitute facilities that the court of appeals acknowledged to be necessary if that measure is not to confer a substantial windfall upon the respondent confirm that fair market value is the standard by which just compensation should be measured, where feasible. These adjustments amount to a highly inefficient and speculative attempt to achieve through a substitute facilities cost-based computation a result approximating the fair market value of the property taken. The practical impact of the court of appeals' decision, then, *at best*, will be to substitute a cumbersome procedure for the equitable, workable and proven fair market value standard. As a practical matter, however, it is more likely that the undue attention that would be focused upon the actual (albeit inflated) cost of the substitute facilities acquired by

respondent by the court of appeals' prescription for a substitute facilities standard would lead to entry of an award against the United States substantially in excess of the value of the property taken. The fair market value standard, by contrast, affords respondent the just compensation that is its due under the Fifth Amendment, without conferring a windfall upon respondent at the expense of the United States.

ARGUMENT

FAIR MARKET VALUE IS THE PROPER MEASURE OF JUST COMPENSATION FOR THE TAKING OF PUBLICLY OWNED PROPERTY THAT HAS A REASONABLY ASCERTAINABLE MARKET VALUE

The court of appeals' decision mandating application of a substitution cost measure of compensation for publicly owned property in circumstances where the market value of the property taken is reasonably ascertainable effects a substantial departure from the general principles governing determination of just compensation that have been developed by this Court. By imposing the substitute facilities measure in situations where the fair market value standard prescribed by the Court provides a workable and fair method of determining just compensation, the decision below renders that determination unnecessarily burdensome and speculative.

A. Fair Market Value Is The Controlling Standard For Measuring Just Compensation

In *United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979) (*Lutheran Synod*), this Court held that the Just Compensation Clause does not require the United States to pay damages measured by the cost of substitute facilities instead of the traditional

fair market value standard, when the United States takes property owned by a private nonprofit organization that is operated for a public purpose. The Court declined in *Lutheran Synod* to decide whether, or under what circumstances, the cost of substitute facilities might be the constitutionally mandated measure of just compensation when publicly owned property is taken. 441 U.S. at 509 n.3, 515.* Nevertheless, *Lutheran Synod* outlines the fundamental principles that are controlling here (*id.* at 510-511 (emphasis added, footnote omitted)):

> In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States*, 292 U.S. 246, 255 (1934). *However, this principle of indemnity has not been given its full and literal force.* Because of serious practical difficulties in assessing the worth an individual places upon particular property at a given time, we have recognized the need for a relatively objective working rule. See *United*

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* Property owned by state and local governments is subject to the federal power of eminent domain. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 17 n.26; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); see *United States* v. *Carmack*, 329 U.S. 230, 242 (1946). In relation to the United States as condemnor, such property is considered to be "private property" for which compensation must be paid under the Fifth Amendment. See *e.g.*, *United States* v. *South Dakota Game, Fish & Parks Dep't*, 329 F.2d 665 (8th Cir.), cert. denied, 379 U.S. 900 (1964); *Jefferson County* v. *TVA*, 146 F.2d 564 (6th Cir.), cert. denied, 324 U.S. 871 (1945); *Town of Bedford* v. *United States*, 23 F.2d 453 (1st Cir. 1927).

> *States* v. *Miller*, 317 U.S. 369, 374 (1943); *United States* v. *Cors*, 337 U.S. 325, 332 (1949). The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay a willing seller" at the time of taking. *United States* v. *Miller*, *supra*, at 374 [additional citations omitted].

Notwithstanding the indemnity ideal, mentioned above, that it is intended to effectuate, the Court has emphasized that the fair market value standard fulfills the constitutional requirement of just compensation and accordingly is to be employed even when such an award does not "compensate for all values an owner may derive from his property," omits the "special value of property to the owner arising from its adaptability to his particular use" or "fails fully to indemnify the owner for his loss" (*Lutheran Synod*, 441 U.S. at 511; *Kirby Forest Industries, Inc.* v. *United States*, No. 82-1994 (May 21, 1984), slip op. 8 n.15)). The fair market value measure comports fully with the Fifth Amendment even though, in particular cases, its application may result in advantage or disadvantage to the condemnee (*Olson* v. *United States*, 292 U.S. 246, 255 (1934)):

> [Market value] may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exhorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain.

The Court has explained that occasional departures from a regime of perfect indemnification that may result from use of the fair market value measure of just compensation are "tolerate[d] * * * because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the *need for a clear, easily administrable rule governing the measure of 'just compensation,'*" *Kirby Forest Industries Inc.*, slip op. 8 n.15 (emphasis added). Justice Frankfurter, writing for the Court, amplified the foundation for the governing fair market value standard in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949):

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.[9]

[9] The very structure of the Fifth Amendment strongly suggests that transferable value, measured by the fair market value standard, satisfies the mandate for just compensation. As the Court observed in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893):

> [J]ust compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

In sum, the Court has adopted the fair market value standard of compensation because it strikes a necessary and proper " 'balance between the public's need and the claimant's loss upon' condemnation of property for a public purpose" (*Lutheran Synod*, 441 U.S. at 512, quoting *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949)). See generally J. Gelin and D. Miller, *The Federal Law of Eminent Domain* § 3.1 (1982).[10]

[10] When there is an active market in property of the sort condemned, market value is readily established by evidence of the sale of comparable properties. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 404 ("[I]n the valuation of readily salable articles, price at the market nearest the taking is, at least in the usual case, a practical rule of thumb, and one that is most likely to place the claimant in the pecuniary position he occupied before the taking.") But when the condemned property is of a kind seldom bought and sold, "resort must be had to other data to ascertain its value." *United States* v. *Miller*, 317 U.S. at 374. Value may be established by capitalization of net income from the property, or the cost to reproduce the condemned property minus depreciation. See 4 *Nichols on Eminent Domain* §§ 12.32 [3][b]-12.32[3][c] (rev. 3d ed. 1977). Such evidence "may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid." *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. at 402. Thus, ordinarily, even when "the property is of a kind seldom exchanged," so that "it has no 'market price' " in some literal sense, compensation due under the Fifth Amendment is only the estimated value of the property to a hypothetical purchaser in a free market transaction: "only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co.* v. *United States*, 338 U.S. at 5-6.

The Court has recognized, however, that there are two situations where an alternative measure of just compensation must be fashioned because the fair market value standard would be inappropriate: "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). These exceptions to the fair market value rule are exclusive: "Other measures of 'just compensation' are employed *only* 'when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public . . . .'" *Kirby Forest Industries, Inc.*, slip op. 8 n.14 (quoting *Commodities Trading Corp.*, 339 U.S. at 123; emphasis added). Thus, here, as in *Lutheran Synod*, the fair market value measure of just compensation must be applied unless "application of the fair-market-value standard • • • would be impracticable or • • • an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment" (441 U.S. at 513).

B. No Justification For A Departure From The Fair Market Value Measure Of Compensation Exists In This Case

The decision below is irreconcilable with this Court's teaching summarized above. Indeed, the linchpin of the court of appeals' analysis is an approach to the case that, in the guise of fidelity to that teaching, actually stands the governing principle on its head (Pet. App. 7a-8a (emphasis added)):

> Although the indemnity principle which animates the just compensation clause of the Fifth Amendment "has not been given its full and literal force," *Lutheran Synod*, 441 U.S. at 510-11, 99 S. Ct. at 1856-57, 60 L. Ed. 2d at 440, *it must nevertheless be our aim* to place a condemnee "in as good a position pecuniarily as if his property had not been taken. • • •" *Olson* v. *United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 708, 78 L. Ed. 2d 1236, 1244 (1934).

Compare pages 16-17, *supra*. And the court of appeals plainly did not find—and could not reasonably have found—that either of the two situations that justify a departure from the fair market value measure of compensation is presented here.

1. First, there can be no claim here that market value "is too difficult to ascertain" or that the property involved is of a "type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property" (*Lutheran Synod*, 441 U.S. at 513). The court of appeals frankly conceded that respondent's "landfill has a determinable market value" (Pet. App. 7a). That conclusion clearly was compelled by the record (see pages 4-5 & note 2, *supra*), and there has been no dispute on this point during the course of these proceedings (see Pet. App. 7a). Accordingly, here, as in *Lutheran Synod* itself (441 U.S. 513-514), practical considerations pertaining to the determination of a representative market value provide no justification for a departure from the fair market value standard."[11]

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[11] The market from which the market value of condemned property may be determined need not be a particularly active one to support application of the fair market value standard. *Lutheran Synod*, 441 U.S. at 513-514.

Specifically, because the market value of respondent's landfill site was reasonably ascertainable by the trier of fact, this case is, as the court of appeals conceded (Pet. App. 7a), "rather different" from those cases in which the lower courts typically have sanctioned the use of a measure of compensation gauged with reference to the cost of establishing or acquiring a substitute facility. As the court of appeals observed (Pet. App. 6a) "the substitute facilities standard has been applied to the condemnation of streets, alleyways, bridges, sewers and other public facilities for which fair market value cannot accurately be determined." *See, e.g., Washington* v. *United States*, 214 F.2d 23 (9th Cir. 1954) (highway); *Town of Clarksville* v. *United States*, 198 F.2d 238 (4th Cir. 1952), cert. denied, 344 U.S. 927 (1953) (sewer system); *City of Fort Worth* v. *United States*, 188 F.2d 217 (5th Cir. 1951) (street); *Woodville* v. *United States*, 152 F.2d 735 (10th Cir.), cert. denied, 328 U.S. 842 (1946) (streets, sidewalks and alleys); *United States* v. *Des Moines County*, 148 F.2d 448 (8th Cir. 1945) (streets).[11] In such cases it is difficult or impossible to fix compensation by the fair market value standard because facilities of this kind ordinarily are not bought and sold in the market and are seldom, if ever, operated privately or on a profit-making basis. *See Lutheran Synod*, 441 U.S. at 513; *Mayor & City Council* v. *United States*, 147 F.2d 786, 790 (4th Cir. 1945). Because some alternative to the fair market value standard necessarily is required in such cases, the reasonable cost of creating an equivalent facility, less an appropriate allowance for depreciation, may serve as a standard for just compensation." The rationale of the foregoing cases, however, is wholly inapplicable here.

[11] See also the cases cited by the court of appeals at Pet. App. 6a.

2. Nor did the court of appeals purport to determine that "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment" (*Lutheran Synod*, 441 U.S. at 513). Indeed, the court of appeals did not undertake to give any reason why a properly determined award of just compensation based upon the fair market value standard would be inadequate—much less so substantial a departure from the indemnity principle as to violate the Fifth Amendment. The district court had determined that the fair market value award embodied in its judgment did place respondent "in as good a position pecuniarily as if its property had not been taken" and that the award accordingly "does not impermissibly deviate from the indemnity principle" (Pet. App. 25a). Yet, the court of appeals did not explicitly find any

[12] As this Court observed in *Lutheran Synod*, 441 U.S. at 509 n.3, "[t]his Court has not passed on the propriety of substitute-facilities compensation for public condemnees." And the Court declined to do so in *Lutheran Synod* itself. Although certain language in *Brown* v. *United States*, 263 U.S. 78, 83-83 (1923), is often cited as the source of the substitute facilities doctrine respecting compensation for public property, that case did not, in fact, address the measure of just compensation requisite under the Fifth Amendment. *Lutheran Synod*, 441 U.S. at 509 n.3. As indicated in the text, however, we acknowledge that an alternative to the market value standard is required when the market value of public property simply is not reasonably determinable, and that a properly framed substitution cost measure may be appropriate in such cases. Compare page 19 note 10, *supra*.

error in the district court's assessment. Rather, unlike the district court, which properly applied the teaching summarized in *Lutheran Synod*, the court of appeals assumed to decide by its own lights that use of any measure of compensation other than the cost of substitute facilities "would be to deny just compensation" (Pet. App. 9a).

a. In support of its judgment, the court of appeals observed that, unlike the nonprofit camp operator in *Lutheran Synod* (see 441 U.S. at 515-516), respondent "presumably was required to spend certain monies to purchase a new landfill site and prepare that site for its purpose," (Pet. App. 8a).[14] But, so to state is scarcely to establish the constitutional inadequacy of compensation for the taking measured by the fair market value of the property taken.

Private condemnees are typically required, as a practical matter, to replace the facilities—residences and business premises—that have been acquired by the sovereign by exercise of the power of eminent domain.[15] Yet—with the exception of the court of appeals decision reversed by this Court in *Lutheran Synod*—it has never been thought that the Just Compensation Clause requires the courts to undertake to evaluate a condemnee's need to replace facilities taken by eminent domain, or to fix compensation due therefor by a substitution cost standard. *Cf. United States* v. *Westinghouse Electric & Manufacturing*

[14] See page 9, *supra*.

[15] Like other courts of appeals, the court below declined to condition the availability of substitute facilities cost compensation upon a showing that replacement of the facility taken was legally necessary (Pet. App. 8a-9a n.6, 10a-11a). See *Lutheran Synod*, 441 U.S. at 515.

Co., 339 U.S. 261, 264 (1950).[16] Moreover, even when replacement of property diverted to government use is in some sense legally required—as, for instance, to permit performance of a condemnee's contractual obligations—the existence of those obligations would not be relevant to the assessment of just compensation absent an actual taking of the contract rights (in addition to the property that is the subject of the contract). See *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923). This result is but a reflection of the general rule that just compensation does not include "nontransferable values deriving from [the former owner's] unique need for property or idiosyncratic attachment to it." *Kimball Laundry Co.*, 338 U.S. at 5. In short, it is not at all apparent how an imperative to replace a condemned facility justifies paying more than market value. *Lutheran Synod*, 441 U.S. at 518 (White, J., concurring).

As previously noted (page 17), the "objective working rule" embodied in the fair market value standard for just compensation may, in a particular case, be more or less generous than a measure based upon the actual cost to the condemnee of the property taken. *Olson* v. *United States*, 292 U.S. at 255. So,

[16] Under provisions of the Uniform Relocation and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, Congress has provided several forms of supplemental assistance, not required by the Fifth Amendment, to certain persons displaced by acquisitions of real property for use in federal projects. *Norfolk Redevelopment & Housing Authority* v. *C&P Telephone Co.*, No. 81-2332 (Nov. 1, 1983), slip op. 6. These provisions include ones designed to facilitate acquisition of replacement housing by displaced homeowners and tenants. 42 U.S.C. 4623, 4624 and 4626. These provisions are not applicable to this case.

too, fair market value may in a particular instance be more or less than the actual cost of replacing the property taken. This is not a one-sided rule; it may work to the advantage of either the United States or the condemnee. For instance, the fair market value standard would ensure that compensation due to a governmental condemnee is not diminished simply because the site needed to replace a facility taken by the United States is donated to the local government by a civic-minded individual or corporation and accordingly need not be acquired at local government expense. Nor is compensation due a local government condemnee to be diminished simply because the municipal corporation is able to strike a more favorable bargain in acquiring a substitute site than data on comparable sales might have suggested.

Indeed, although the question does not appear to be entirely settled, the more carefully-considered view appears to be that when replacement of a local government facility or site taken by the United States is unnecessary, but the facility or site had demonstrable market value in uses that were not legally foreclosed, the condemnee is entitled to compensation based upon the fair market value of the property taken, and is not to be denied compensation for property that it owned or limited to nominal compensation. See, *e.g.*, *United States* v. *3,727.91 Acres of Land (Elsberry Drainage District)*, 563 F.2d 357, 359-360 & n.3 (8th Cir. 1977); *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 n.9 (2d Cir. 1968); *California* v. *United States*, 395 F.2d 261, 266 (9th Cir. 1968).[17] Accordingly, the

[17] But cf. *Caporal* v. *United States*, 577 F.2d 113, 117-118 (10th Cir. 1978); *Mayor & City Council* v. *United States*, 147 F.2d at 789-791. As the Eighth Circuit observed in *Elsberry*

fair market value standard of compensation operates in an even-handed manner as applied to the taking of public property, such as that in issue here, that has a reasonably ascertainable market value. It provides that measure of compensation that is just both to the condemnee and to the United States. See *United States* v. *Commodities Corp.*, 339 U.S. at 123; *Bauman* v. *Ross*, 167 U.S. 548, 570 (1897); *Searl* v. *School District*, 133 U.S. 553, 562 (1890).

b. The court of appeals declared (Pet. App. 9a) that respondent's "loss from the condemnation was the amount of money reasonably spent in [respondent's] venture to create a functionally equivalent facility." The court of appeals evidently assumed that an award of fair market value compensation would impermissibly leave respondent less than whole. That assumption, however, runs directly afoul of the very definition of fair market value: "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States* v. *Miller*, 317 U.S. 369, 374 (1943); *Lutheran Synod*, 441 U.S. at 511; *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973). Because

Drainage District, in those cases in which a local government has been limited to nominal compensation for the taking of its streets by the United States, "the public condemnee * * * held only a right of way easement in a public street or alley, and upon condemnation, * * * retained no [compensable] interest in the property" (563 F.2d at 359 (citing *United States* v. *Streets, Alleys & Public Ways*, 531 F.2d 882, 887 (8th Cir. 1976), *United States* v. *City of New York*, 168 F.2d 387, 389-390 (2d Cir. 1948), and *Woodville* v. *United States*, 152 F.2d 735, 736-737 (10th Cir.), cert. denied, 328 U.S. 842 (1946)). The Eighth Circuit explained: "This same reasoning does not apply, however, where the public body continues to own a fee interest in the condemned land." 563 F.2d at 359.

the record establishes that a market existed for landfill properties comparable to respondent's former site in the vicinity of Duncanville, and that the fair market value of the condemned property was ascertainable, there is no reason to believe that the *reasonable* cost of a functionally *equivalent* substitute facility would be greater than what a willing buyer would pay to a willing seller for such a facility.

Contrary to what the court of appeals apparently believed, the fact that the condemnee is a governmental body does not abrogate the relationship between fair market value and the ideal of indemnification. Indeed, the reverse appears to be true, for, like respondent (see page 5, *supra*), state and local government condemnees themselves typically enjoy the power of eminent domain. The eminent domain authority of public condemnees serves to confirm the constitutional adequacy of the fair market value standard of compensation in three respects.

First, it is settled that the Fifth (and Fourteenth) Amendments are satisfied by the payment of fair market value when a state or local government entity acquires private property. Thus, to allow any different or more generous recovery to local government condemnees would provide them with a windfall,—*i.e.*, more than it would cost them to acquire a substitute facility in eminent domain proceedings. Second, even if a state or local government condemnee makes no resort to eminent domain proceedings to replace property taken by the United States, the availability of the power of eminent domain protects the condemnee in negotiating with the owners of substitute sites. It offsets any opportunity that might otherwise exist for a private owner to take advantage of a city's pressing need for substitute property

that may be in short supply in the marketplace, by demanding an exorbitant price. Finally, the availability of the power of eminent domain to a public condemnee may substantially broaden its range of choice in locating a substitute site. It need not confine its consideration to sites that are already on the market, or those where the owner is willing to sell; likewise the public condemnee is free to acquire precisely the quantum of property and the interest therein that it needs to carry on the function formerly carried out at the site acquired by the United States. As a result, an award of fair market value to a public condemnee is well-calculated to fulfill the objectives of the indemnity principle.

C. The Court of Appeals' Effort to Adjust the Substitute Facilities Standard to Avoid A Windfall Only Demonstrates the Appropriateness of the Fair Market Value Standard; the Court of Appeals' Formulation Renders the Determination of Just Compensation Unnecessarily Difficult and Will Prejudice the United States

The court of appeals correctly recognized that if respondent were awarded the entire amount it expended in acquiring and developing the substitute facility it actually established, it would, for two separate reasons, stand to receive a substantial windfall. First, the court acknowledged, such an award would overcompensate respondent because the substitute facility it acquired is substantially larger, more capacious, and has a much longer usable life than the landfill being replaced (Pet. App. 13a-14a). Second, the court recognized that respondent would be overcompensated if reimbursed for its actual expenses in the event those expenses were not reasonable under the circumstances (*id.* at 17a).

To limit the windfall potential of the substitute facilities cost measure, the court of appeals devised two correctives. First, the court directed that the jury be instructed upon remand to make an appropriate deduction from the substitute facilities cost to reflect "the benefits Duncanville gained from the acquisition of the new landfill" (*id.* at 14a; see page 10 & note 6, *supra*). Second, the court of appeals made clear that the jury should be instructed upon remand to disallow the costs respondent seeks to recover to the extent they exceed what is "reasonable under the circumstances" (Pet. App. 17a).

The very adjustments that the court of appeals recognized to be necessary confirm that its decision to abandon the fair market value criterion was unjustified. If the adjustments are to achieve the objectives outlined by the court of appeals, they amount to a highly inefficient and speculative means of achieving through a substitute facilities-cost-based computation a result that approximates the fair market value of the property taken.

For instance, deduction from the cost of substitute facilities of an amount reflecting the enhanced value of the new facility as compared with the old, will undoubtedly limit the windfall potential of the substitute facilities measure (but see page 32 note 18, *infra*). But the same objective is achieved, more directly, by determining the market value of the property actually taken, through examination of comparable sales. Moreover, although the court of appeals found fault with the district court's instructions in this regard (see page 10, *supra*), it did not specify how an appropriate deduction reflecting the enhanced value of the replacement facility should be calculated, and it suggested that various approaches might be acceptable. Pet. App. 15a & n.9. This

amorphous prescription for an inherently subjective adjustment is a poor substitute for the "relatively objective working rule" (*Lutheran Synod*, 441 U.S. at 511) afforded by fair market valuation.

Similarly, the court of appeals' casual suggestion that whether respondent's actual expenditures were "reasonable under the circumstances" is a question for the jury on remand (Pet. App. 17a) cloaks a complex matter in deceptively simple garb. The court did not indicate *how* the jury was to make this assessment. But unless the jury is to be turned loose to speculate on this matter, it must have both evidence and a legal standard to guide it. The best available benchmark for determining reasonableness in the circumstances, however, is the market value of the property acquired.

The combined effect of the two adjustments contemplated by the court of appeals, if they are meticulously carried out, will be to attempt to reconstruct the market value of the property actually taken. But the result, at best, would be to impose superfluous layers of complexity upon a determination that can more readily and directly be made through the traditional fair market value approach.

No warrant exists for this burdensome departure from the ordinary method of determining just compensation. Moreover, it is reasonable to fear that, as a practical matter, the United States will be unfairly prejudiced by the procedure prescribed by the court of appeals. That procedure focuses undue attention upon the actual expenditures incurred by a condemnee such as respondent, irrespective of their reasonableness in the circumstances and the substantial disparities between the value of what was taken and that of the substitute facility acquired. The likely result is that the United States not infrequently

would be held liable for amounts substantially in excess of the fair market value of the property it has taken, with a concomitant windfall to the condemnee."[10]

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[10] Unsatisfactory results are particularly likely because the issue of just compensation is frequently tried to a jury. See Fed. R. Civ. P. 71A(h). When juries are employed in condemnation proceedings, they "should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive." *Kimball Laundry Co.* v. *United States*, 338 U.S. at 20.

The record in this case confirms that unfairness to the United States is likely to result from the use of a substitute facilities measure of compensation, however it may be adjusted in an effort to prevent a windfall. The district court instructed the jury to determine respondent's substitute facilities cost "measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable [respondent] to serve its constituents in approximately the same way it would had the condemnation not occurred." The jury was further directed "to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill." Pet. App. 15a. See pages 5-6 note 3, *supra*. The court of appeals concluded that these instructions did not adequately "take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (Pet. App. 14a). We agree with that conclusion. It must nonetheless be acknowledged that the instruction given by the district court at least pointed the jury in the direction of deducting for such benefits.

In the face of the district court's instruction, and evidence adduced at trial that clearly demonstrated the unreasonableness of the respondent's claimed substitution costs, the jury returned an alternative verdict under the substitute facilities instruction of $723,654.01, an amount that exceeded the fair market value verdict of $225,000 by almost one half million dollars. Even assuming that a more adequate substitute facilities instruction would have reduced this disparity, the

Thus, here, just as in *Lutheran Synod*, even if use of the fair market value standard of just compensation departs from the indemnity principle in any respect, its use is "justified by the necessity for a workable measure of valuation" (441 U.S. at 516-517), and is "consistent with the 'basic equitable principles of fairness,' *United States* v. *Fuller*, 409 U.S. 488, 490 (1973), underlying the Just Compensation Clause" (441 U.S. at 517).

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result here leads us to question the sufficiency of instructions such as the court of appeals contemplated as a means of preventing the jury from bestowing a windfall upon a public condemnee.

CONCLUSION

The judgment of the court of appeals should be reversed.[10]

Respectfully submitted.

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[10] We note that the court of appeals' ruling that the rate of interest to be awarded upon the deficiency in estimated compensation should be determined by the jury rather than the court (see pages 10-11 note 6, *supra*) is open to question. *Cf. United States* v. *Reynolds*, 397 U.S. 14 (1970). In limiting our petition to the substitute facilities issue—the question we deemed most worthy of review by this Court in the setting of this case—we did not signal endorsement of the court of appeals' ruling on this point. Absent a congressionally fixed interest formula that will satisfy the Fifth Amendment requirement of just compensation, the government has maintained that in order to promote uniformity of result and fairness, reduce the costs and complexity of litigation, facilitate decision, and provide a predicate for future settlements, the district courts should determine the proper interest rate.

RESPONDENT'S

BRIEF

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No. 83-1170

In The

Supreme Court of the United States

October Term, 1983

United States of America,

Petitioner

v.

80 Acres of Land, Etc. and The City of Duncanville, Texas,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF DUNCANVILLE, TEXAS

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QUESTION PRESENTED

Whether *Just* Compensation is measured by the substitute facilities doctrine or by the fair market value method, where necessary public sanitation facilities, after condemnation, must be relocated at a cost greater than the fair market value of condemned land on which the facilities were located.

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No. 83-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF DUNCANVILLE, TEXAS

STATEMENT

This is a suit filed by the United States, against the City of Duncanville, to condemn a sanitary landfill site owned by the City of Duncanville. The property, approximately 50 acres, was to be used as part of a lake to be constructed by the corps of engineers. The issue at trial was whether to determine just compensation by the fair market value of the property condemned, or by the substitute facility method. (R. 136).

The trial court submitted two issues to the jury: one, inquiring as to the market value of tract 318, the property condemned, and the other special issue inquiring as to the reasonable cost for the City of Duncanville to construct and provide a functionally equivalent substitute sanitary landfill for the 50 acres, more or less, condemned by the United States.

The jury determined that the market value of the 50 acres being condemned was Two Hundred Twenty-Five Thousand Dollars ($225,000.00). (R.199).

The jury determined that the reasonable cost for the City of Duncanville to construct and provide a functionally equivalent substitute sanitary landfill was Seven Hundred Twenty-Three Thousand One Hundred Twenty-Four Dollars and one Cent ($723,124.01). (R. 200).

The trial court entered judgment based upon the jury's answer to special issue no. 1 fixing the market value of the condemned property in the amount of Two Hundred Twenty-Five Thousand Dollars ($225,000.00), plus interest on the amount of the deficiency of Twenty-Five Thousand Fifty Dollars ($25,050.00) at the rate of six percent (6%) per annum from October 3rd, 1978 (R. VI, p. 232).

At trial, Mr. M.M. Harrington, the City Manager of the City of Duncanville, testified that as a part of the governmental duties which the City performed, it operated the sanitary landfill, and had been operating such landfill for about eleven (11) years. (R. VII, p. 56). He testified that after the property in question had been condemned, the City had to make arrangements for the temporary use of a landfill site. (R. VII, p. 58). He further testified that as a result of the Government's condemnation of the City's landfill site it was necessary for the City to acquire a substitute facility for the landfill site; that the City did acquire a substitute facility; and that the City was operating the sanitary landfill on the substitute landfill site. (R. VII, p. 60).

Mr. Robert B. Lee, Director of Public Works of the City of Duncanville, testified that prior to October 3rd, 1978, the City was operating a sanitary landfill as a disposal place for solid waste pickup within the City. He testified that in 1978 the United States Government took over the facility and that the City temporarily used a landfill site in Ferris, Texas. Subsequent to the taking of the City's landfill by the United States, the City of Duncanville acquired a substitute landfill site. (R. VII, p. 75).

Mr. Lee testified that the cost incurred by the City of Duncanville in the acquisition and preparation of substitute facilities was the sum of One Million Two Hundred Seventy-Six Thousand Three Hundred Eleven Dollars and Sixteen Cents ($1,276,311.16). (R. VII, p. 78). He testified that the substitute facilities were necessary to the City. (R. VII, pp. 78-79). [A breakdown of the expenses incurred by the City of Duncanville in acquiring the substitute facilities is shown by the Defendant's Exhibit 1 in the trial court].

Mr. Lee testified that the amount of money represented by the $1,276,311.16 were monies reasonably necessary to be spent or contracted to be spent by the City in acquiring and preparing the substitute facilities to be used as a landfill by the City. (R. VII, p. 81). He testified that it was necessary for the City to have purchased 113.7 acres of land when they bought the alternate site. (R. VII, p. 91). This was done in order not to have to pay damages to the property owner for other properties. (R. VII, p. 92.). He also testified that: it is difficult to find a landfill site which the state will permit; that the City had made an effort to locate landfill sites other than the one actually purchased; that they had to purchase the 113 acres in order to avoid being

exposed to a claim for damages to the remainder; and that the 113 acres was the smallest the owner could sell to the City. (R. VII, p. 117). The entire acreage purchased by the City is being used as a part of the landfill operation (R. VII, p. 119). Mr. Lee also testified that the City could not have purchased a new landfill site for less than they paid for the one they acquired, nor could they have converted it to a usable landfill and obtained a permit from the state without spending the money the City spent on it. (R. VII, p. 121).

Colonel John E. Wall, District Engineer for the corps of engineers, recognized in a letter he wrote dated June 1st, 1978, the fact that it was necessary for the City to acquire another landfill site. His letter contains the following, to wit:

> We realize that, as a result of this acquisition it will be necessary for the City to obtain another site for its landfill operations. . . .
>
> Landowners are allowed ninety (90) days in which to locate after acquisition of their property; however, in this case, we request that the site be located as soon as possible in order to minimize pollution problems. It is requested that the City begin immediately the lengthy process of acquiring the necessary permit for a new landfill site, (Defendant's Exhibit "A") (R. VIII, pp. 409-410).

The City of Duncanville appealed the trial court's entering of judgment in the fair market value amount. The Fifth Circuit Court of Appeals reversed and remanded the case. It held that "under the Fifth Amendment a public condemnee which has a legal or factual duty to replace a condemned facility is entitled to the reasonable cost of a functionally equivalent substitute facility." Opinion

below, 706 Fed. 2d 1336, 1337. The court remanded the case so that a jury could determine the value of any benefits accruing to the City of Duncanville in acquiring the new facility and to allow a jury to determine the reasonableness of the additional costs to the City when considered in connection with possible benefits. The case was further remanded to allow the City to present evidence of the proper rate of interest as an element of just compensation.

The City of Duncanville petitioned this Court for a writ of certiorari in cause No. 83-714, based on errors in applying the Federal Rules of Appellate Procedure. The City's petition in No. 83-714 was denied. Subsequently, the United States was granted this writ of certiorari to review the merits of the opinion in *United States v. 30 Acres of Land*, 706 F.2d 1336. (5th Cir. 1983).

SUMMARY OF ARGUMENT

The issue here is just compensation to the people of Duncanville, Texas for public property taken by the federal government. It is a measure of damages now taking place in a special context: federal government condemnation of local government property being used for the health, safety and welfare of local citizens. The City of Duncanville has suffered a real, measurable loss at the hands of the federal government. The loss includes not only the land actually taken through eminent domain, but also the costs incurred for relocating public sanitation facilities from the condemned land to a new site.

In substance, the United States contends that the local residents must absorb any amount of loss that results beyond the fair market value of the land actually taken from them. In calculating damages, the government would ignore incidental damages resulting from the nature of

the land's use and the necessity for replacing the condemned public land. Loss, according to the government, should not include costs for acquiring temporary and permanent sites that were necessary in order to continue sanitation services to the local citizens. The people of Duneaville submit that upholding the government's contention would work manifest injustice on small local governments and their taxpaying citizens.

ARGUMENT

a. Measuring Just Compensation

"The purpose of just compensation is to reimburse the owner/condemnee for the loss he has suffered by the taking of the property." Opinion below, 706 F.2d 1356, 1360. "The word 'damages' is of general import, and is equivalent to compensation. It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner ..." *Beaman v. Ross*, 167 U.S. 548, 562 (1897) (citation omitted).

Just compensation requires that a condemnee be put in as good a position pecuniarily as if the property had not been taken. Cases demonstrate that the law is flexible in arriving at just compensation. In some cases, for instance, a calculation of damages may constitutionally deduct incidental, special benefits that accrue to a condemnee from the taking, e.g. when a new highway benefits the condemnee's remaining property, 167 U.S. at 561-562, and just compensation may include incidental injury. "[W]here part only of a parcel of land is taken ... the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental benefit or injury to the part not taken is also to be considered." *Id.* at 574 (emphasis added). Alternatively, if a condemnee

suffers no financial loss, then nominal compensation of one dollar may constitute just compensation. *See Caporal v. United States*, 317 F.2d 113 (10th Cir. 1978). Also, just compensation may be in the form of property directly awarded to the condemnee in substitution for his condemned property, *see Brown v. United States* 263 U.S. 78 (1923), or in the form of the cost of substitute facilities where the condemned property must necessarily be replaced by a public condemnee. *See* cases cited in opinion below, 706 F.2d at 1359.

The court below determined that the City of Duneaville was entitled to the cost of a reasonably necessary substitute facility. This determination should be upheld.

b. In this Case, Fair Market Value is an Inadequate Measure of Damages in Violation of the Fifth Amendment's Just Compensation Clause.

The Government's first point recites that "fair market value is the controlling standard for measuring just compensation." Petitioner's Brief, p. 15. Certainly fair market value, in some circumstances, constitutes just compensation. This Court, however, has refused to designate market value as the sole measure of just compensation. *United States v. 50.34 Acres of Land*, 441 U.S. 506, 512-513 (1979). *(Lutheran Synod)*.

The Government's brief discusses "fair market value" in isolation from the facts of this case. The brief begs the question of how fair market value can constitute just compensation to the people of Duneaville. The loss to the City was not merely a piece of land, but rather it was land that was replaced by necessity in order to continue essential municipal sanitation services.

The Government relies heavily on the *Lutheran Synod* case. In *Lutheran Synod*, however, the county was over

bestowing a windfall if substitute facilities were never acquired by the condemnor. 441 U.S. at 516. These are not the facts in this case, since substitute facilities were both required and acquired. Nor does this case involve summer camps that in *Lutheran Synod* were owned by a non-public condemnee. In contrast, this case involves one of the most fundamental functions a city performs. The question here is whether local residents must bear the loss resulting from a taking of the land that was essential to those functions.

In its brief at pages 13, 14, and 28, the Government states a bold theory that a fair market value award for federally condemned public property would be equivalent to the fair market value of a substitute site that might be acquired through a local public condemnee's own power of eminent domain. This curious proposition is wholly without support in the record.

On the contrary, this case clearly indicates that the City of Duncanville negotiated an arm's length transaction for 113 acres of substitute land in order to avoid an award of greater damages to the seller, whose property would be otherwise subject to condemnation by the City. (R. VII, pp. 91-92, 117). According to the Government's own theory, the City of Duncanville was protected in its negotiations for the 113 acres by the availability of the City's power of condemnation. *See* Petitioner's Brief, pp. 28-29. Duncanville, however, suffered a loss in an amount exceeding the fair market value of its old facility. Duncanville's loss shows the fallacy of the Government's argument that the fair market value of federally condemned property is necessarily equal to the fair market value of reasonable replacement property, even when the replacement property may be subject to local condemnation power.

It is likewise impossible to follow the logic in Part C of the Government's brief, beginning at page 29. The Government opines that the fair market value of Duncanville's condemned property will be equal to the cost of its substitute facilities after deducting benefits gained from the new acquisition and deducting costs to the extent they exceed what was reasonable under the circumstances. *See* Petitioner's Brief pp. 30-31. In reality, however, the City of Duncanville did demonstrate that, even after the jury considered possible benefits and possible unreasonable costs, the City's loss exceeded the fair market value of the condemned land. Despite this remaining loss to the City, the Government argues that fair market value constitutes just compensation to the people of Duncanville.

The City of Duncanville contends that the jury properly decided the cost of reasonable substitute facilities and that judgment should be rendered for the City in the sum of $723,124.01, plus interest. Judicial economy, therefore, is the only sound reason not to affirm the opinion below insofar as it orders a remand on the value of the substitute facilities. The Government complains, however, that the opinion below should not be followed on the grounds that a jury would be incapable of determining the value of any benefits and reasonableness of cost to the City. Petitioner's brief, p. 31. The City submits that, historically, trials are conducted and juries are called to decide previously such issues.

c. The Substitute Facilities Method is the Proper Measure of Just Compensation to the City of Duncanville.

The City of Duncanville, a Home Rule City in the State of Texas, is charged with the duty of collecting and disposing of garbage and refuse accumulated by its citizens. This is a governmental function imposed upon the City by the laws of the State of Texas. *City of Fort Worth v. Savage*, 108 S.W.2d 929, 931 (Tex. Civ. App. — Fort Worth 1937, writ ref'd). *See also Brady v. City of Abilene*, 458

S.W.2d 696 (Tex. Civ. App. — Eastland 1970, no writ). Duncanville's leaders determined that the city's sanitation services had to be relocated. They found temporary accommodations and then ultimately found a suitable permanent site that would meet requirements of the State of Texas.

Awarding the cost of substitute facilities is a well established means of providing just compensation after necessary public facilities have been condemned. Contrary to the Government's argument, the substitute facilities doctrine is neither novel in theory nor complex to implement.

In *City of Fort Worth, Texas v. United States*, 188 F.2d 217 (5th Cir. 1951), the Government had condemned one of the city's main thoroughfares. The United States successfully argued that since it had paid for minor street improvements in order to detour traffic, the value of those improvements was adequate compensation to the city. Rejecting the argument, the opinion stated "that the City is entitled to an award sufficient to provide such traffic facilities as are necessary to restore its entire adjacent system of such facilities to the same status of utility as was enjoyed prior to the taking." *Id.* at 221.

The court in *City of Fort Worth*, and the Petitioner's Brief here, cite *Monongahela Navigation Company v. United States* 148 U.S. 312 (1893). Although *Monongahela* is an old case and its facts may be distinguished from the case in hand, the Government's argument in that case was the same argument that the Government advances here. The Government argued that mere compensation for the condemnee's tangible property was sufficient, notwithstanding that the condemnee lost its valuable use that was unique to the property. Holding that the condemnee was entitled to the value of its franchise as well as to the value of the tangible property, the court stated: "the government takes it away from the company whatever use

it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken ..." *Id.* at 343 (emphasis added).

Here, as in *Monongahela* the Government desires to pay for the value of the land to the Government, ignoring the fact that the damages to the City included replacing the use of the land in order to continue its sanitation service. The City's legal or practical necessity for acquiring substitute facilities can scarcely be called an inconvertible "idiosyncratic attachment" to its property so as to justify a fair market value award. See Petitioner's Brief p. 35. Rather, the proper damages to the City in this case, include replacing the use of the condemned property at a reasonable substitute facility.

In *United States v. Certain Land in the Borough of Manhattan*, 403 F.2d 900 (2d Cir. 1968), the court noted that the substitute facilities doctrine has been developed to meet the unique needs of public condemnees. *Id.* at 903. The principle of fair market value, according to the opinion, "should be abandoned "when the nature of the property or the uses renders a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else" ". *Id.* at 902 (citation omitted).

In *United States v. 20.41 Acres of Land, More or Less, in Osborne County, Kansas* 459 F.2d 494 (10th Cir. 1968), the Government condemned only part of the property necessary to the operation of a sewage plant by the City of Bunn, Kansas. The Government complained, on appeal, that damages had been erroneously based on a taking of the entire sewage treatment plant. The appellate court's opinion stated, "where the Government takes a part of the property necessary to the operation of a sewage plant, the Government should make it possible for the sewage

plaintiff's interest to acquire other property to use in substitution for the property taken." 479 F.2d at 698. Certainly, if a partial condemnation may require compensation for substitute facilities in order that the necessary use may continue, then in this case the City of Duncanville should be compensated for the cost of substitute facilities where the Government has condemned the entire property formerly used by the City.

In *United States v. Certain Land in the Borough of Brooklyn, County of Kings, City and State of New York*, 346 F.2d 690 (2d Cir. 1965), the Government had determined the fair market value for the public property that it had condemned. Yet the court held that the cost of substitute facilities was the proper measure of damages where the United States had condemned a city owned and operated playground. The holding in *Brooklyn* underrate the Government's argument here that an ability to estimate fair market value of the tangible property requires that fair market value be the method of determining just compensation. The *Brooklyn* court ruled that care must be taken "not to translate a formula which produces fair results in many cases into a categorical imperative that must be applied regardless of the consequences." *Id.* at 694 (citation omitted).

There are additional cases to support the City of Duncanville. In *United States v. Certain Land in the City of Red Bluff, Etc.*, 192 F. Supp. 725 (N.D. Calif. 1961), the court held that the cost for substitute facilities is the proper measure of damages where a municipally owned parking lot operated by the city for public use was condemned by the federal government. In *Town of Charlesville, Virginia v. United States*, 199 F.2d 238 (4th Cir. 1952), the court recognized the doctrine of cost of substitute facilities and also recognized that the city was entitled to recover for the extra cost of operating the new facility. In addition to the authorities cited, numerous cases are discussed in 40 A.L.R. 3d at page 143 involving the cost of substitute facilities as a proper measure of compensation paid to a state or municipality for the condemnation of public property.

As mentioned earlier in this brief, and as pointed out in the cases cited in 40 A.L.R. 3d, where there is no duty or obligation on the condemnee to replace the public facilities that have been condemned, then some courts award no damages because the municipality is considered as not to have been damaged. In contrast, it is clear that where the City of Duncanville has a duty to and does actually acquire substitute facilities, then the proper measure of damages should be the reasonable cost of such functionally equivalent substitute facilities.

CONCLUSION

The City of Duncanville, Respondent herein, respectfully submits that the proper measure of damages to be awarded as just compensation under the Fifth Amendment of the United States Constitution is the cost of its substitute facilities as determined by the jury in the trial below. Accordingly, the City of Duncanville prays that this Court render judgment in the sum of $723,124.01, plus interest or that, in the alternative, the opinion below be affirmed in all respects.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v.

50 ACRES OF LAND, ETC., and
THE CITY OF DUNCANVILLE, TEXAS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What measure of compensation is constitutionally required when the federal government's condemnation of property used by a state or local government to perform an essential governmental function forces the state or local government to acquire a costlier substitute facility?

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IN THE

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UNITED STATES OF AMERICA,
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50 ACRES OF LAND, ETC., and
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Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI [1]

Amici are organizations whose members include state, county and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues affecting the rights

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

and responsibilities of such governments. This case presents an issue of great importance concerning the measure of compensation constitutionally due these governments when the federal government condemns property they are using to provide essential governmental services.

The federal government urges this Court to hold that state and local governments can receive as compensation only the fair market value of the condemned property, not the cost of substitute property which they are compelled to acquire in order to continue providing vital services. The result of the federal government's position is unfair financial hardship to state and local jurisdictions. For state and local governments are obligated by law or practice to perform a large number of crucial functions requiring the use of property subject to the federal condemnation power. The property used for such functions includes fire stations, police stations, schools, hospitals, parks, recreation areas, streets, waste disposal sites and airports. When the federal government condemns the property used to provide these and other services, state and local governments have no choice but to replace the property with substitute facilities. In most cases the fair market value of the condemned facilities is less than the cost of replacing them. Thus, under the federal government's position, state and local governments are forced to bear this increased cost themselves, even though it is the federal government's demand for their property that prevents them from continuing to use existing, lower cost facilities.

Because this case requires the Court to determine whether the federal government may constitutionally pay state and local jurisdictions a measure of compensation that causes them financial hardship in continuing to carry out their obligatory governmental functions, *amici* are submitting this brief to assist the Court in its consideration of the questions raised by this litigation.

STATEMENT OF THE CASE[1]

The respondent, City of Duncanville, is a small city of 28,000 people located in the State of Texas (Pet. App. 3a). One of the governmental obligations imposed upon the City by state law is the collection and disposal of its own refuse (*id.* at 8a-9a, n.6). From 1969 through October 1978, Duncanville met that obligation by trucking its garbage to a sanitary landfill site it owned and operated just outside the city.

In 1978, the federal government condemned the tract of land that Duncanville had been using as its landfill. The federal government took immediate possession of this tract (the Ballwag site) by filing a declaration of taking, and Duncanville was required to locate another site at which it could dispose of its daily garbage. For the two years following the condemnation, while it sought a permanent replacement, Duncanville trucked its garbage to an interim site 22 miles southeast of the city. (Pet. App. 3a) At trial, in the United States District Court, Duncanville introduced evidence showing that, in order to utilize the interim site, it was required to expend $110,449.64 over and above the costs it would have incurred had it been able to continue to use the Ballwag site (see *id.* at 16a-17a, n.10).

After two years, the City was able to obtain permits for, purchase, and prepare a new tract to serve as a landfill (the Ellis County site). This tract was larger than the Ballwag site and was approximately the same driving distance from Duncanville (Pet. App. 13a-14a). City officials testified that the Ellis County site was obtained after a search for other locations proved unsuccessful (Tr. Vol. II, 117). They stated that the City had to purchase the entire tract, rather than a portion of it, in

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[1] References to the Appendix filed with the petition for a writ of certiorari shall be noted as Pet. App. ——. References to the transcript of the record shall be designated Tr. Vol. ——.

order to avoid a costly suit for damages accruing from severance (*id.* at 12a-13a). The actual cost to the City to purchase and prepare the Ellis County landfill was in excess of one million dollars (*id.* at 16a-17a, n.10).

The United States estimated that the value of the condemned Ballwag site was $199,950, and deposited that amount into the registry of the court (Pet. App. 3a). Because this sum was substantially below the amount the City had expended to continue to discharge its obligation to dispose of refuse, Duncanville requested a trial, which was held before a jury (*ibid.*).

The jury found that the reasonable cost to Duncanville of supplying a functionally equivalent landfill site was $723,654.01 (Pet. App. 4a). It fixed the fair market value of the condemned Ballwag site at $225,000 (*ibid.*). The district court ruled that fair market value is the proper measure of compensation, and accordingly awarded Duncanville the lower sum (Pet. App. 21a). In addition, the court found that Duncanville had not introduced sufficient evidence to show the reasonable cost of a functionally equivalent landfill (*id.* at 22a).

The court of appeals reversed. It pointed out that "'just compensation' and 'market value' are not always synonomous" and that in *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979), this Court "reaffirmed that fair market value is not and cannot be the single, inflexible measure of just compensation" (Pet. App. 5a). The court held that the reasonable cost of substitute facilities is the appropriate measure of compensation where the condemnee is a public entity that has an obligation to replace the property. Unlike a private owner, the court reasoned, "in order to continue to provide a necessary public service", Duncanville was obligated to purchase a new landfill site. "Its loss from the condemnation," the court said, "was the amount of money reasonably spent in that venture to create a functionally equivalent facility." "To deny Duncanville reimbursement for its unavoidable loss," the court concluded, "would be to deny just compensation" (*id.* at 8a-9a).

The court of appeals also ruled that Duncanville had made a sufficient showing of the reasonable cost of a functionally equivalent landfill. Specifically, the court noted that Duncanville had submitted evidence of the price of the new site, the cost of preparing it, and the necessity of purchasing the entire tract rather than a smaller portion (Pet. App. 12a-13a).

Though the court of appeals adopted the "substitute facilities" measure of compensation, it thought that the trial court's instructions were inadequate to permit the jury to make a complete determination of the reasonable cost of substitute facilities. The court believed that the trial judge should have specifically instructed the jury to deduct from the award an amount representing "the benefit Duncanville gained from the acquisition of the new fill," which had a longer useful life than the old one and could hold more refuse. The court therefore remanded the case for a new trial (Pet. App. 14a-16a).

SUMMARY OF ARGUMENT

1. In giving content to the Fifth Amendment's requirement of just compensation, this Court has applied the "indemnity principle," under which the condemnee must be put in as good a position as if property had not been taken. However, because practical difficulties arise in assessing the value of specific property to a given individual at a particular time, the Court has employed the concept of fair market value in order to measure a condemnee's loss. For fair market value often provides a relatively objective working rule for measuring compensation. But the Court has been cognizant that fair market value is not necessarily synonymous with full indemnification, and should not always be used as the test of compensation. It has thus ruled that fair market value will not be the criterion where it would be unjust.

2. The issue here is the standard of compensation to be employed when the federal government condemns property used by a state or local government in carrying out an essential governmental function. The federal government's insistence that market value must be the criterion of just compensation in this case is contrary to the Court's teachings that market value is not necessarily the test. The federal government's position also results in manifest injustice to state and local governments.

State and local governments are obligated by law or necessity to provide essential sovereign services and facilities to their citizens. When the federal government condemns property used to provide these necessary services, state and local jurisdictions have no choice but to replace the property with substitute facilities. These facilities usually cost more than the market value of the condemned property. The federal government's position that fair market value must be the criterion of compensation here would unfairly compel state and local jurisdictions to bear this additional cost out of their own revenues, even though it is the federal government's insistence on taking their property which causes them to be unable to continue using existing lower cost facilities.

The federal government defends its position by arguing that state and local governments should be treated the same as private parties, who receive only the fair market value of condemned property. But in this nation of dual sovereignties, state and local governments are *different* than private parties. They have governmental duties private parties cannot and do not have, are obligated to replace condemned property used to carry out those duties, use all their property for the public's benefit and hold it as the public's trustee, and are entitled to be compensated for the public's loss.

3. There is an easily workable, objective rule for appropriately determining the compensation to be paid when

the federal government condemns property used by a state or local jurisdiction to perform a governmental function. In such cases, the state or local jurisdiction should receive the fair cost of the most similar substitute facility which is reasonably available. A substitute facilities measure of compensation has been used by courts in many past cases and is thus familiar to the judiciary. The substitute facilities rule suggested by *amici* strikes a just balance between a state or local jurisdiction's duty to continue performing its governmental obligations, and the federal government's desire to not pay the costs of substitute properties that are unnecessarily superior.

The suggested rule is also easy to apply. It entails only a determination of what similar properties are reasonably available, which of them is closest to the condemned facility in terms of such salient characteristics as size, capacity and physical condition, and what the fair cost of the most similar property would be. In making these determinations, a fact finder would consider the substitute facility actually obtained by a state or local government and the amount paid for it. At the same time, the federal government could try to show that another facility equally or more similar to the condemned one could have been obtained less expensively.

4. The rule *amici* propose is at least as easy to apply as the fair market value standard urged by the federal government. In fact it is easier and more workable because fair market value is far from a simple or wholly objective criterion.

The difficulties and subjectivism of the fair market value test is manifest under each of the three methods commonly used to determine fair market value. For example, the capitalization-of-income method requires that there *be* a stream of income, but governmental properties often produce no such stream. It also requires a subjective choice regarding the capitalization rate to be used. The assessment-of-comparable-sale method presents dif-

ficulties because there are few sales of governmental facilities and, in any event, assessing the comparability of properties is a complex and subjective endeavor. Finally, the reproduction-cost-less-depreciation method involves subjective and greatly varying judgments regarding the useful life of property.

Thus, condemnation trials involving fair market value often result in a battle of experts regarding the appropriate method of calculating values, and in widely varying estimates of such value. The fair market value standard is certainly no simpler than *amici's* standard, which merely requires the jury to assess whether other properties are similar to the condemned one, whether they are reasonably available, and whether the cost of obtaining a property was reasonable in comparison to the cost of acquiring others or building a new one.

5. *Amici's* rule is also far simpler than the test laid down by the court below, which would require the jury to subtract from the cost of a substitute facility the "benefits" a state or local government obtains because the substitute facility is better or will last longer. The lower court's rule would require the trier of fact to undertake the job of mathematically quantifying the "benefits" of a replacement facility. In most cases the multitude of variables involved would make this a difficult and cumbersome task. *Amici's* rule, on the other hand, does not require mathematically quantified assessments of alleged benefits, but only a general assessment of whether a property is sufficiently similar to a condemned one to serve as a substitute.

ARGUMENT

I. THE INDEMNITY PRINCIPLE, UNDER WHICH A CONDEMNEE IS MADE WHOLE, IS THE BASIC DESIDERATUM OF JUST COMPENSATION. IT YIELDS ONLY WHEN AND TO THE EXTENT REQUIRED BY PRACTICAL NECESSITY, AND IT DOES NOT YIELD WHEN DOING SO WOULD BE UNJUST.

The Fifth Amendment prohibits the federal government from taking property for a public use without paying "just compensation."[*] The Court has stated that "[i]n giving content to the just compensation requirement . . . this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken'." *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 511 (1979). The Court thus seeks "to "make the owner whole," *ibid.*, a tenet known as the "indemnity principle."

The indemnity principle cannot always be given "full and literal force," however. *Lutheran Synod, supra*, 441 U.S. at 511. For there can be "serious practical difficulties in assessing the worth an individual places on particular property at a given time." *Ibid.* A piece of property may, for example, possess objectively unmeasurable value *for* a specific individual because he has an "idiosyncratic attachment" to it or a "unique need" for it. 441 U.S. at 511, quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). It has traditionally been thought that individuals have unique attachments to specific pieces of real estate such as ancestral homes.

Because practical problems in objectively measuring value can make it difficult to assess and grant full in-

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[*] Although the amendment refers to "private property," it guarantees that public owners, no less than private ones, will receive just compensation when the federal government condemns their property. *See United States v. Carmack*, 329 U.S. 230, 242 (1946).

demnification to a condemnee, this Court has employed fair market value as a criterion for measuring the condemnee's loss and compensation. Fair market value assesses not the idiosyncratic and unmeasurable value of property to a particular individual, but value which is more widely shared and is therefore transferrable. In many cases it has therefore satisfied the "need for a relatively working rule." *See Lutheran Synod, supra*, 441 U.S. at 511 (citations omitted).

But the Court has remained cognizant that payment of fair market value is not necessarily synonymous with full indemnification that makes a party whole. Concomitantly, it has remained cognizant that full indemnification is the desideratum, that this desideratum yields only because of practical necessity, and that it does not yield where doing so would be inappropriate or unfair. The Court has thus said that "while the indemnity principle must yield *to some extent* before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate." *Lutheran Synod, supra*, 441 U.S. at 512. Two such situations have been identified: cases in which it is too difficult to determine market value, and cases in which an award restricted to market value would be unjust. But "[w]hatever the circumstances," the need to award compensation which is just is a " 'dominant consideration.' " *Ibid.*, quoting *United States v. Commodities Trading Corporation*, 339 U.S. 121, 123 (1950).

II. WHEN THE FEDERAL GOVERNMENT TAKES PROPERTY USED BY STATE OR LOCAL GOVERNMENTS FOR ESSENTIAL GOVERNMENTAL FUNCTIONS, IT IS APPROPRIATE TO RESTRICT COMPENSATION TO THE MARKET VALUE OF THE CONDEMNED PROPERTY, AND TO THEREBY FORCE STATE AND LOCAL JURISDICTIONS TO BEAR THE INCREASED COSTS OF REPLACEMENT PROPERTIES WHICH THEY ARE COMPELLED TO ACQUIRE.

This case involves the question of compensation to be paid for condemned property used by a local government in carrying out one of its essential governmental functions: the collection and disposal of refuse. The federal government asserts that, because it is possible to estimate the fair market value of the condemned property, market value is the criterion necessarily to be used in assessing just compensation. However, the federal government's insistence that market value must be the criterion of just compensation is contrary to the teachings of this Court, under which fair market value is not necessarily the test of compensation, but is only a means of implementing the indemnity principle in a workable and reasonably objective manner. As well, the federal government's position visits manifest injustice upon state and local governments.

These governments are obligated by law or necessity to provide essential sovereign services and facilities to their citizens. Such services and facilities include police protection, fire protection, public health facilities, waste disposal services, schools, roads, airports, parks, recreational facilities, and other necessities. When the property used to provide these necessities is condemned by the federal government, state and local jurisdictions have no choice but to replace the property with substitute facilities. The substitute facilities often (indeed usually) cost more than the fair market value of the condemned property. Under the federal government's position, state and

local jurisdictions are unfairly compelled to bear this cost out of their own limited revenues, even though it is the federal insistence on taking their property which causes them to be unable to continue using existing lower cost facilities to perform sovereign functions.

The instant case is an example of this unjust result. The federal insistence on taking the Ballwag site made it necessary, according to the jury's calculation, to spend almost three times the value of the Ballwag property in order to replace it. The rather small city of Duncanville thus had to spend one half million dollars more than the federal government offered in order to continue carrying out a vital governmental function. Here, as in other cases, it would be much fairer for the federal government to bear the increase in cost, which it could spread over the entire citizenry, just as its projects are said to benefit the entire citizenry.[4]

The federal government defends its position by asserting that state and local governments should be treated the same as private parties, who receive only the fair market value of condemned property (See U.S. Br. 24-25). But in this nation of dual sovereignties, state and local governments are *different* than private parties. They have governmental duties which private parties cannot and do not have. Their difference is emphasized by the factors used by this Court in determining that private condemnees should be confined to receipt of fair market value. Unlike private parties—even non-profit private parties such as the one whose property was taken in *Lutheran Synod*—state and local governments are under

[4] In addition to imposing an economic hardship on states, cities and counties, federal condemnation can disrupt the orderly provision of capital facilities and services because state or local jurisdictions may unexpectedly be required to transfer monies from the one account or project to another in order to pay for substitute facilities, or may have to postpone or cancel projects entirely.

a "legal or factual obligation to replace" condemned property used to carry out their governmental duties. *See Lutheran Synod, supra*, 441 U.S. at 515. Thus, there is no possibility of a "windfall" arising because "substitute facilities were never acquired, or if acquired, were later sold or converted to another use." *Ibid.* Also unlike private parties, state and local governments "hold [their] property as the public's trustee", and are "entitled to be indemnified for the public's loss" accruing from the condemnation of the property. *See* 441 U.S. at 516. Finally, unlike private parties, state and local governments' use of their property in fulfilling governmental duties is by definition for the public's benefit—there will be no "subjective estimation" by a jury of whether the property is used to benefit the community. *Ibid.*

The federal government also seeks to support its position by claiming that state and local governments will receive "windfalls" if market value is not the test of compensation (U.S. Br. 29). The argument is that, if the cost of substitute facilities is awarded to the condemnee, it may obtain a better or longer lasting facility than the condemned one. As explained in the next section, however, there is a simple, objective way of limiting the extent to which the cost of a better, longer lasting facility can increase the compensation due a state or local condemnee: the condemnee can be awarded only the fair cost of the most similar replacement facility that is reasonably available. Moreover, to the extent that the most similar, reasonably available facility is better and costs more than the condemned property, the necessity of acquiring the superior facility is not due to anything the state or local government did, but to the federal government's demand to take the existing facility. The federal government should thus have to bear the increase in cost, rather than being able to impose it upon the state or local government.

III. WHEN THE FEDERAL GOVERNMENT CONDEMNS PROPERTY BEING USED BY A STATE OR LOCAL GOVERNMENT TO PERFORM A GOVERNMENTAL FUNCTION, THE STATE OR LOCAL GOVERNMENT SHOULD RECEIVE THE FAIR COST OF THE MOST SIMILAR SUBSTITUTE FACILITY THAT IS REASONABLY AVAILABLE.

A. The Rule of Compensation Urged by *Amici* is Just and Easy to Apply.

There is an easily workable, objective rule for determining the compensation to be paid when the federal government condemns property that a state or local jurisdiction is using to perform a governmental function: as indicated above, the state or local jurisdiction should receive the fair cost of the most similar substitute facility which is reasonably available. The measure of compensation will ensure that a state or local jurisdiction can continue to carry out its governmental obligations without undue financial hardship, while simultaneously ensuring that the federal government does not have to pay the costs of substitute properties that are unnecessarily superior. The rule thus achieves a just and proper balance.[6]

The rule also accords with past judicial practice. For the cost of acquiring or creating substitute facilities has already been used as the measure of compensation in many cases in which the federal government has condemned property lacking a readily ascertainable market value, and has also been used where market value *is* as-

[6] On infrequent occasions the cost of acquiring a similar substitute facility may be less than the fair market value of condemned property used by a state or local jurisdiction to perform governmental functions. In such an unusual case, the state or local condemnee should receive the fair market value. For the indemnity principle requires that the condemnee be made whole, and this rquirement would not be met if the state and local condemnee did not receive the higher fair market value.

certainable. The use of a substitute facilities standard is thus familiar to the courts.[6]

The rule urged by *amici* also is easy to apply. It entails only a determination of what similar properties are reasonably available, which of them is closest to the condemned facility in terms of such salient characteristics as size, capacity and physical condition, and what the fair cost of the most similar property would be.

Thus, if the federal government condemns a building, one would determine whether similar existing buildings could reasonably be acquired and the fair cost of the most similar one. If a building with similar characteristics does not exist or cannot be obtained at a fair price, one would determine the reasonable cost of constructing a new building having capacity similar to the condemned facility. (The new building would be the only one reasonably available.)

In making these determinations, a fact finder would consider the substitute facility actually obtained by a state or local government and the amount paid for it, but the federal government could try to show that another facility equally similar to the condemned one could have been obtained less expensively.[7]

[6] See, *e.g.*, *United States v. Certain Property in the Borough of Manhattan*, 403 F.2d 800 (1968) (market value ascertainable); *United States v. Board of Education, Mineral County*, 253 F.2d 760 (4th Cir. 1958) (same); *Washington v. United States*, 214 F.2d 33 (9th Cir. 1954); *Town of Clarksville v. United States*, 198 F.2d 238 (4th Cir. 1952), cert. denied, 344 U.S. 927 (1953); *City of Fort Worth v. United States*, 188 F.2d 217 (5th Cir. 1951); *Woodville v. United States*, 152 F.2d 735 (10th Cir.), cert. denied, 328 U.S. 842 (1946); *United States v. Des Moines County*, 148 F.2d 448 (8th Cir. 1945); and cases cited at Annot., 40 A.L.R. 3d 143 (1971).

[7] In making this showing, the federal government could argue that the most reasonable course of action would have been for a state or local government to use its own power of eminent domain to secure similar property at a reasonable price. On the other hand, the state or local government could argue this was not the most reasonable course of action because there was no similar property

The simple workings of the rule urged by *amici* can also be illustrated by the present case, in which Duncanville actually purchased the Ellis County site to replace the Ballwag site. Here the jury would assess whether parcels of land that could appropriately be used as a landfill were reasonably available, which of them was most similar to the Ballwag site in terms of duration of use and capacity, and what the fair costs of the parcels were. In making these determinations, the jury would consider Duncanville's actual efforts to secure property and the price it paid, as well as any evidence submitted by the federal government that a parcel equally or more similar to the Ballwag site could have been obtained at a cheaper price than was paid for the Ellis County site.[8]

B. The Rule Urged by *Amici* is Easier to Apply and More Workable Than the Fair Market Value Test, Since the Market Value Test Creates Difficulties and Uses Subjective Judgments.

The simple workings of the rule urged by *amici* made it at least as easy to apply as the fair market value standard urged by the federal government. In fact, *amici* believe their rule would be easier to apply, and more workable, because fair market value is far from a simple or wholly objective criterion. This Court itself has recognized that fair market value is only a "*relatively*

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to be condemned, its price was too high, or it is not fair for a state or local government to have to impose the hardships of condemnation upon one of its citizens in order to escape the hardship being imposed upon the state of local government itself by the federal government.

[8] There can be unusual circumstances in which property most similar to a condemned parcel is nonetheless so much more expensive than other clearly serviceable property that it is plainly unreasonable to acquire the most similar facility. In such unusual circumstances the jury should be free to award the state or local government only the cost of the less similar but plainly serviceable facility, since the more similar one can be deemed not to have been reasonably available at reasonable cost.

objective working rule" *Lutheran Synod*, *supra*, 441 U.S. at 511 (emphasis added); it is more objective than taking account of property's idiosyncratic value to a particular owner, but it utilizes much subjective judgement. The difficulties and subjectivism of the fair market value test, both in general and as specifically applied to essential facilities of state and local governments, is manifest in numerous ways.

There are at least three different methods of determining fair market value: capitalization of the stream of net income, assessment of sales of comparable property, and calculation of reproduction cost less depreciation. See 4 *Nichols on Eminent Domain* §§ 12.32[3][b]-12.32[3][c] (rev. 3d ed. 1977). Each of these methods gives rise to problems. Capitalization of net income requires that there *be* a stream of net income. But the facilities of state and local governments often do not generate net income: there is no stream of income from firehouses, police stations, schools, streets, landfills, parks, or numerous other facilities.[9] Moreover, even when there is a stream of income from a governmental or private facility, the value of the facility under the capitalization method depends upon the capitalization rate that is used. (An annual stream of income of $100,000 yields a value of one million dollars when capitalized at a rate of ten percent and of approximately $833,000 when capitalized at a rate of twelve percent). The choice of the precise capitalization rate, however, involves subjective judgments regarding risks and correspondingly appropriate rates of return.

Assessment of sales of comparable property requires that there *be* such sales. But there are few sales of such governmental facilities as firehouses, police stations, roads, metropolitan airports, parks, school buildings, jailhouses,

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[9] Even when a public facility generates income, the income is not intended to cover the cost of capital, but only the costs of operation. Thus the income is not an appropriate gauge for measuring fair market value.

and capital buildings. Moreover, even when there have been prior sales of a particular kind of governmental or private property, complex questions arise concerning the extent to which, and the respects in which, the previously sold property is similar to or different from the condemned property.

Reproduction cost minus depreciation requires a choice of the appropriate rates of depreciation. This choice involves subjective judgments regarding the useful life of property. These judgments can vary greatly, particularly in connection with governmental property, which can be used for dramatically different periods of time depending upon the particular government's financial circumstances.

Finally, aside from difficulties of determination and subjectivism associated with particular methods of ascertaining market value, the process of determination is further complicated by the fact that legally permissible assessments of fair market value must exclude value arising from a federal project on adjacent land or from the federal government's need for the land being taken. *See United States v. Miller*, 317 U.S. 369, 376-378 (1943); *United States v. Cors*, 337 U.S. 325, 333-34 (1949).

Thus, market value is not necessarily a simple or straightforward criterion, either in general or as applied to property used to perform governmental functions. It is little wonder that condemnation trials involving market value almost always include a battle of experts as to which theory of determining such value is appropriate and as to the correctness of widely varying estimates of value. The fair market value criterion is certainly no simpler or more straightforward than the standard urged by *amici*, and probably is much less so. For under *amici's* standard, the jury need only assess whether other properties are similar to the condemned one, whether they are reasonably available, and whether the cost of obtaining a property was reasonable in comparison to the cost of acquiring others or building a new one.

C. The Rule Urged by *Amici* is Simpler and More Workable Than the Test Laid Down by the Lower Court.

The rule urged by *amici* is also far simpler than the test laid down by the court below. Though the lower court agreed that a state or local government should recover the cost of substitute facilities, it would require the jury to subtract from those costs the "benefits" such government obtains because the substitute facility is better or will last longer. Quantifying such benefits, however, can be difficult. For example, a substitute building may have thirty percent more square footage than the condemned one, but may have offices that are undesirably smaller or larger, may have fewer elevators to serve a larger number of floors, may have a less efficient climate control system, may be less accessible to main local roads or local public transportation, or may be farther from airports or railroad lines. Thus, it could hardly be said that the state or local government received a "benefit" of thirty percent just because there is thirty percent more square footage, and quantifying an alleged benefit would obviously be difficult.

The rule urged by *amici* is far simpler and more workable, since it does not require mathematically quantified assessments of alleged benefits, but only a general assessment of whether a property is sufficiently similar to a condemned one to serve as a substitute. Moreover, even if a property does provide some "benefit" to a state or local government because it is better, it is fair for the federal government to bear any increased cost rather than unjustly imposing it on the state or local government via a mathematically dubious deduction for benefit. For as said earlier, the necessity of acquiring the better facility is not due to anything the state or local government did, but to the federal government's desire to take the existing

lower cost facility that was being used by the state or local entity.[10]

CONCLUSION

For the foregoing reasons this Court (1) should rule that when the federal government condemns property used by a state or local government to perform governmental functions, the measure of compensation is the fair cost of the most similar substitute facility that is reasonably available and (2) should remand to the lower court for further proceedings not inconsistent with the Court's opinion.[11]

Respectfully submitted,

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[10] The instant case may conceivably present an unusual situation in which it is possible to quantify alleged benefits with relative ease, because they relate to mathematically calculable increases in fillable cubic feet and in life span. But even if benefits can be mathematically quantified here, it will more often be the case that they cannot be, and it is thus doubtful that a generally applicable rule can or should require their quantification. It is normally more workable and appropriate for the fact finder to simply make a general assessment of whether a property is sufficiently similar to the condemned one to serve as a substitute facility—the assessment required under the rule urged by *amici*. Moreover, even if a substitute facility does provide some benefit to a state or local government because it is better, for reasons given in the text it is fair for the federal government to bear any increased cost.

[11] *Amici* take no position on whether Duncanville did or did not pay only the fair cost of the most similar substitute facility that was reasonably available. That is a question which can be determined on remand.

AMICUS CURIAE

BRIEF

MOTION FILED

No. 83-1170

AUG 31 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE and BRIEF OF AMICI CURIAE, OPEN LANDS PROJECT AND LAND TRUST EXCHANGE, IN SUPPORT OF RESPONDENT, THE CITY OF DUNCANVILLE, TEXAS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The Open Lands Project, an Illinois not-for-profit corporation, and the Land Trust Exchange, a Massachusetts not-for-profit corporation, move for leave of the Court to file the attached brief as *amici curiae* in support of the respondent. Accompanying this motion and brief are the written consents of all parties in the case to the filing of the brief.

Leave of the Court to file the attached brief is necessitated by United States Supreme Court Rule 36.2 and is hereby requested because the *amici* first became aware of the existence of this case after the respondent's brief had been filed. The

consents which accompany this motion and brief, and which would ordinarily obviate the need to seek leave to file, attest to the willingness of the parties for leave to be granted for filing the brief of the *amici*. The consents also indicate that the parties will suffer no prejudice, and the petitioner will have full opportunity to reply to the arguments raised in the attached brief.

As explained in the "Interest of Amici Curiae" section of the brief of *amici*, the *amici* are public interest groups who assist or whose member organizations assist state, local, and municipal governments in acquiring, reclaiming, and maintaining lands for the public benefit and for the discharge of public functions. *See* Brief of Amici at 1-3. Examples of these dedicated public lands are wetlands for flood control, erosion reduction, and water purification, and urban green spaces for air quality control, wildlife preservation, and recreation. Wetlands, urban green spaces, and similar public lands provide needed public benefits which must be replaced at public expense if the lands are condemned. Frequently, however, the fair market values of public lands do not reflect the cost of replacing the public benefits which they provide. Federal condemnation of such lands may require state and local governmental entities to obtain functionally equivalent replacement facilities at costs in excess of the fair market values of condemned lands.

With the respondent, the *amici* have an interest in ensuring that the long-standing application of the substitute facility doctrine in public condemnation cases be affirmed by the Court as a valid alternative measure of just compensation when fair market value does not compensate the governmental entity for the cost of its continuing obligation to maintain the benefits which the property provided. Leave to file the attached brief is sought by the *amici* because of the importance of the issue before the Court not only to municipalities but also to local and state governmental entities which maintain and provide land

and facilities which serve public needs and provide public benefits. The *amici* believe that the attached brief will aid in the Court's determination of the important issue raised in this case and respectfully ask that leave be granted to file the brief of the *amici curiae*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

50 ACRES OF LAND, ETC. AND THE CITY OF DUNCANVILLE, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE, OPEN LANDS PROJECT AND LAND TRUST EXCHANGE, IN SUPPORT OF RESPONDENT, THE CITY OF DUNCANVILLE, TEXAS

INTEREST OF AMICI CURIAE

Amici curiae in this case are public interest groups. The Open Lands Project is an Illinois not-for-profit corporation which advises and assists state, local, and municipal govern-

ments in acquiring, reclaiming, and maintaining land, both undeveloped and urban, for the public benefit and for the discharge of public functions. The Land Trust Exchange, a Massachusetts not-for-profit corporation, is a nation-wide communications network of over 500 local and regional organizations which, like Open Lands, are involved in the acquisition, reclamation, and preservation of land.

As was true of the federal condemnation of the Duncanville landfill, federal condemnation of the public properties acquired and maintained by the state, local, and municipal governments under the aegis of Open Lands and members of the Land Trust Exchange may result in a need by those governmental bodies to obtain functionally equivalent replacement facilities at a cost in excess of the fair market value of the dedicated public properties.

With the respondent in this case, Open Lands and members of the Land Trust Exchange have an interest in ensuring that the long-standing application of the substitute facility standard by lower federal courts be affirmed by the Court as a valid alternative method for determining just compensation in public condemnation cases. Together with the respondent, the court below, and other federal courts which have considered the issue, the *amici curiae* believe that the existence of fair market value for condemned public property does not, as the petitioner urges, abrogate the use of the substitute facility standard. Indeed, when the fair market value of condemned public property is in reality not fair and does not compensate the governmental entity for the cost of its continuing obligation to maintain the public benefits which the property provided, the fifth amendment compels the election of the substitute facility method to determine just compensation.

Some of the protected public lands under the aegis of Open Lands and members of the Land Trust Exchange are nature preserves. As such, they appear to bear a superficial resem-

blance to the federally condemned wildlife and recreational area which was held in public trust by the state of South Dakota in *United States v. South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir. 1964), *cert. denied*, 379 U.S. 900 (1964), and for which fair market value rather than replacement cost was deemed just compensation. Scrutiny of the Eighth Circuit's decision reveals that it is without relevance or application either to the facts before the Court or to the federal condemnation of any public preserves under the aegis of the Open Lands and members of the Land Trust Exchange. The *amici curiae* have a further interest, therefore, in assuring that the Court recognizes that *South Dakota Game, Fish and Parks* is based on unique facts without general applicability and that the validity of the substitute facility rule in public condemnation cases is not narrowly limited to municipal landfill cases.

SUMMARY OF THE ARGUMENT

Based on the Court's decision in *United States* v. *564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506 (1979), and the Eighth Circuit's decision in *United States* v. *South Dakota Game, Fish and Parks Department*, *supra*, the petitioner in this case would have the Court overturn the finding of the court below that the "reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace condemned property." *United States* v. *50 Acres of Land (City of Duncanville)*, 706 F.2d 1356, 1360 (5th Cir. 1983). Instead, the petitioner urges the Court to hold as a matter of law that, whenever condemned public property has a determinable market value, that determinable market value constitutes the public entity's just compensation for purposes of the fifth amendment.

The petitioner's position is without support in logic or the law. To fabricate support, the petitioner consciously and consistently attempts to obfuscate the very real and decisive distinctions between the private condemnee and the public condemnee as well as the equally real and decisive distinctions between fair market value and substitute facility value in public condemnation cases. The petitioner's attempts are unavailing. The distinctions between private and public, fair market and replacement cannot be obfuscated; nor can they be ignored. The Court's rationale in *Lutheran Synod*, the well-reasoned decisions of lower federal courts, and considerations of public policy all underscore the importance of those distinctions and compel the application of the substitute facility standard in cases, like the case before the Court, in which the determinable market value of condemned public property does not compensate the public condemnee for the functionally equivalent facility it is obligated to provide.

Correctly recognized by the court below as applicable to the facts of this case, the substitute facility standard is the appropriate measure of just compensation when a public entity must replace condemned property for which fair market value is inadequate. The decision of the court below should be affirmed.

ARGUMENT

I. JUST COMPENSATION CLAUSE COMPELS CONSIDERATION OF SUBSTITUTE FACILITY STANDARD IN FEDERAL CONDEMNATION OF PUBLIC PROPERTY

Well-developed by lower courts in public condemnation cases, the substitute facilities rule and its rationale were succinctly summarized by the Court in *Lutheran Synod*. In public condemnation cases, the lower courts have first assessed whether the condemned property was reasonably necessary to the public welfare "to determine if the entity has an obligation to continue providing the facilities taken." 441 U.S. at 515. If the condemnee has a duty which is "legally compelled or arises[s] from necessity" to replace the property, the courts have held that "only an award of the costs of developing requisite substitute facilities will compensate for the loss." *Id.* (citing *United States* v. *Certain Property in Borough of Manhattan*, 403 F.2d 800, 803 (2d Cir. 1968)).

For the very reasons that the reasonable-necessity/substitute-facility analysis was without application to *Lutheran Synod*'s private condemnee, that analysis is, as the court below decided, directly applicable to the case of the public condemnee now before the Court. Because of the nature, interests, needs, and function of public condemnees, that analysis will always be a threshold analysis in the federal condemnation of public property. For the same reasons, the fair market value of "'what a willing buyer would pay in cash to a willing seller' at the time of the taking" is frequently an inadequate measure of the public condemnee's loss. *Id.* at 511 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)). In such cases, the substitute facility standard is a fair, a workable, and the only measure of the just compensation mandated by the fifth amendment.

A. Availability of the Substitute Facility Standard Is Necessitated by the Nature, Interests, Needs, and Function of the Public Condemnee.

In its petition and brief, the petitioner uncritically recounts the Court's rationale for rejecting the substitute facility measure in private condemnation cases as justification for indiscriminate application of fair market value, where determinable, in public condemnation cases. The petitioner argues, for example, that the substitute facility standard is inappropriate and an "objective" standard is needed " '[b]ecause of serious political difficulties in assessing the worth an individual places on particular property at a given time.' " Pet. at 12 (quoting *Lutheran Synod* at 511). The " 'special value of property to the owner arising from its adaptability to his particular use' " and "[t]he value of property . . . [springing] . . . from subjective moods and attitudes" would make any standard but fair market value too subjective. Brief for Petitioner at 18 (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)). "In sum," the petitioner concludes,

> the Court has adopted the fair market value standard of compensation because it strikes a necessary and proper " 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose" (*Lutheran Synod*, 441 U.S. at 512, quoting *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949)).

Brief for Petitioner at 19.

The fallacy underlying the petitioner's argument is obvious. Private condemnees—even when they are private not-for-profit organizations—are not and cannot be public entities. Their natures, interests, needs, and functions are distinct, separate, and without analogy. The Court's adoption of a fair market standard in private condemnation cases does not require the rejection of the substitute facility doctrine in public condemnation cases.

Unlike the private condemnee, the public condemnee embodies and defines the interests and needs of an entire community of private citizens, their businesses and organizations. Its sole function is to serve the community—i.e., to ascertain the interests and needs of the community and to promote those interests and satisfy those needs. Because the community and the public condemnee are by nature and function one and the same, the interests and needs of the community find their concrete expression in the actions of the public entity which functions for it. By contrast and by definition, the nature of the private condemnee, whether an individual, a business, or an organization, is individualistic. However altruistic and selfless the interests and needs of the private condemnee may be, they are in most instances personal and subjective.

Because the interests and needs of private condemnees are usually personal and subjective, valid concerns generally require the use of an objective fair market standard. Those concerns are, however, simply not relevant in the case of a public condemnee. There is no difficulty, let alone "serious practical difficulty," in assessing the worth a public condemnee places on particular property. Since the public condemnee acts on behalf of and as the community, the value of public property is the benefit of that property to the community. Unlike the usual objectives and needs of private condemnees, the objectives and needs of the public condemnee are not "subjective," and the "special value" of public property to the public entity which owns it can be properly and objectively measured by the property's benefit to the community.

Since the value of a public condemnee's property can be objectively measured by its benefit to the community, compelling considerations of public policy mandate the application of the substitute facility doctrine when fair market value is inadequate. Federal condemnation is always premised on a public need. When that condemnation involves a private

citizen, business, or organization, a cognizable public need is balanced against private objectives and individual needs. In such a case, fair market value is the most expedient way to quantify the otherwise subjective value the private condemnee places on those private objectives and individual needs. For the good of the commonweal, an individual condemnee may, therefore, be required to accept fair market value compensation which is less than full indemnification for his property. The same considerations do not apply to the public condemnee. While the federal government has the unquestioned right and power to condemn the property of state and local governments, the exercise of that power must always entail a recognition that what is being condemned is not property serving private objectives and individual needs but property which is already meeting an objective, albeit different, public need and providing a public benefit. While the federal government has the right and power to condemn public property, it does not have the right to judge the public need or the power to condemn the public benefit.[5]

Where the fair market value for condemned public property does not equal the cost to the public condemnee of replacing the public benefit engendered by that property, the fifth amendment and public policy demand the use of a measure which fairly represents the cost to the public condemnee of

[5] In the context of what constitutes a "necessary" public facility requiring replacement, one commentator has stated:

> To talk of the "necessity" of such facilities misses the crucial point. The politically responsible branches of state and local government have already determined that it is in the interest of the community to have such facilities. They have provided them for their citizens; and a federal taking means that these services are no longer available. For a federal court to override local judgment by determining that such services are not necessary is an unjustified interference with political decisions.

Note, *Just Compensation and the Public Condemnee*, 75 Yale L.J. 1013, 1015 (1966).

replacing the condemned property. That measure is the substitute facility standard.

B. Because of the Nature, Interests, Needs, and Function of the Public Condemnee, a Fair Market Standard Is Frequently an Inadequate Measure of the Public Condemnee's Loss.

The fair market value standard recognized by the Court in *Lutheran Synod* is one that operates in a world of private investment, market expectations, profits and losses. It is a standard which is ideally suited to the world of everyday commerce and rational choices. It is a standard which, in the typical case, objectively and fairly measures an individual's loss in a private condemnation action.[6]

Unlike private citizens and commercial enterprises, state, local, and municipal governments do not operate in a world of maximized profits and rational economic choices. Because they embody and define the interests and needs of the communities they serve and because they function to promote and satisfy those interests and needs, they must provide necessary facilities and services which are not commercially available. When directed by their constituencies to do so, these governmental entities must also provide facilities and services which are commercially available. While such facilities and services are operated at a profit commercially, they are made available by state and local governments to the public at cost or at a loss. Finally, to ensure the essential services which they must provide, public entities frequently must use properties for purposes

[6] As much as the owner of the family home "built to the owner's tastes, but . . . old and deteriorated" (*Lutheran Synod*, 441 U.S. at 514) might fondly wish that a potential buyer would pay a premium for the home's ambiance, the owner would not realistically expect that any buyer would actually pay that premium. There is no reason why that realistic expectation should be exceeded simply because the federal government has condemned his house. The fair market value is, therefore, a fair and objective measure of his loss.

unrelated to any of the commercial uses which a shrewd businessman might deem efficient and profitable. In all three instances, fair market value is an inappropriate and inadequate measure of a public condemnee's loss.

Roads and sewage treatment facilities fall into the category of necessary facilities and services which are not commercially available. For such facilities and services there can be no fair market valuation, and, as lower courts have consistently held, the proper measure of damages is the cost of providing a substitute facility if the government still needs such facility. *See City of Duncanville* and cases cited, 706 F.2d at 1359.

Landfills and parking lots are examples of facilities commercially available but provided to the public at cost or at a loss by local municipalities. Notwithstanding the petitioner's attempts to have the Court rule otherwise, the fair market values of similar landfills and parking lots which are commercially available are not accurate gauges of the just compensation owed a municipality. This is true because both the buying price and the selling price of the commercial facilities will necessarily reflect a commercial for-profit use of the facilities. The price, for example, of the landfill which the City of Duncanville was forced to purchase was high because it had never been used. A commercial buyer would pay such a price with the expectation that primary return on his investment would be made in the payments for the garbage dumped, not in the sale of the landfill 40 years later for residential or commercial use. By contrast, the fair market price for the well-used Duncanville landfill condemned by the petitioner was low.[3]

[3] According to the Petition for a Writ of Certiorari, the City of Duncanville had operated the landfill for nine years at the time of the taking. Pet. at 2. "At the date of taking, approximately 15 acres of respondent's landfill had been filled with waste and approximately five acres of the total area were unusable for landfill because of the presence of a creek . . . . Approximately 313,000 cubic yards of the landfill's capacity had been used, and the remaining capacity was 650,000 cubic yards, an amount that gave it an expected lifetime of 12.9 years . . . ." *Id.* at 2-3 (citations omitted).

This is because the similarly well-used landfills which were used to establish the fair market value for the public landfill had been in private hands and their selling prices reflected the profitable use their commercial owners had already made of them.

Recognizing the inequity of measuring the compensation owed a municipality for a condemned facility by the fair market value of comparable commercial facilities, the United States District Court for the Northern District of California held that, if still needed, the defendant-municipality was entitled to the cost of securing a substitute facility for its condemned parking lot. *United States* v. *Certain Land in the City of Red Bluff*, 192 F. Supp. 725, 727 (N.D. Cal. 1961). The court noted: "Property dedicated by a governmental body to a public use, which brings the body no income, or less income than the cost of maintaining it, should not be valued by a market value test. Such valuation would obviously be unreasonable under the circumstances." *Id.* at 726 n. 1. Such valuation is no less unreasonable in the case before the Court.

Fair market valuation would also be unreasonable when the fair market value of condemned public property does not reflect the state, local, or municipal government's use of that property. Wetlands, for example, are frequently held by local governmental bodies as water purifiers; for flood control; and for renewing groundwater supply, trapping silt, and reducing erosion. Their value to the community lies not only in the fact of their being wetlands but in their location as well. The likelihood of replacing one marsh with an equally beneficial marsh is slim at best. Since marshes must be drained and filled to be developed, their fair market value is low. The cost, however, to the public of financing the water treatment systems, flood control programs, and artificial reservoirs necessitated by the condemnation, drainage, and filling of wetlands would be anything but low.

Application of the fair market value standard to condemned public property operated without profit or whose function is not related to its fair market value " 'would result in manifest injustice to . . . [the] . . . public.' " *Lutheran Synod*, 441 U.S. at 512 (quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). "[A]ward of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment." *Id.* at 513. The cost of necessary and functionally equivalent substitute facilities is the proper measure of just compensation owed to a public entity when fair market value does not compensate for that cost.

C. Functionally Equivalent Substitute Facility Standard Is Workable and Fair in Public Condemnation Cases.

In its brief, the petitioner suggests that the awarding of anything more than the fair market value of the City of Duncanville's condemned landfill would result in a windfall and that use of the adjustments to the reasonable replacement cost which were mandated by the court below would "be to impose superfluous layers of complexity upon a determination that can more readily and directly be made through the traditional fair market value approach." Brief for Petitioner at 31. The petitioner is wrong on both counts.

First, the calculation of the just compensation due in substitute facility cases does not yield a windfall to a municipality because, as the court below instructed, deducted from the reasonable cost of a functionally equivalent substitute facility are the benefits which the municipality gains from the new facility. *City of Duncanville*, 706 F.2d at 1362. *See also Borough of Manhattan, supra*.[4] Second, contrary to the petitioner's suggestions and absent unusual circumstances, the adjustment of the actual cost paid for a substitute facility by the deduction of benefits gained will not yield "the fair market value of the property taken." Brief for Petitioner at 30. This is true because both the market value of the condemned facility and the cost of the substitute facility are based on the commercial assumption that the facilities have been or will be used commercially for profit.[5] Only a distress sale of substitute facilities might change that reality. The court below properly remanded this action for "a fair and complete determination of the costs, including consideration of benefits received, of this particular substitute facility." *City of Duncanville*, 706 F.2d at 1363.

When the jury on remand determines the adjusted cost of Duncanville's new landfill, there can be no issue arising from a concern that its award will be used for other purposes: the substitute landfill has already been purchased; the money has already been spent. There will be no "windfall" in the form of unallocated, extra funds. Even when, however, a municipality has not purchased or completed the substitute facility for which it has been awarded funds, there can be no such "windfall."

In *Lutheran Synod*, the Court found that the private condemnee was "free to allocate its resources to serve its own institutional objectives, which may or may not correspond to community needs." 441 U.S. at 515. The Court declined to

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[4] Addressing the windfall concerns of the government in *Borough of Manhattan*, the Second Circuit stated:

> Even when substitution is required, sumptuous awards need not be feared. Exact duplication is not essential; the substitute

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(Footnote continued from preceding page)

> need only be functionally equivalent. The equivalence required is one of utility. . . . Moreover, equitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years. With deference to several contrary holdings, we believe the amount should be calculated and an appropriate deduction made.

403 F.2d at 804 (citations and footnotes omitted).

[5] *See supra* pp. 9-11.

award replacement costs on the grounds that such an award "would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use." *Id.* at 516. Public condemnees have no such freedom. Substitute facility costs are awarded if, and only if, a substitute facility is necessary; if it is necessary, the public condemnee is under either a legal or factual obligation to secure the substitute facility. Since the funds are awarded to the public condemnee on behalf of its citizens, citizen review should be inducement enough to any local government to fulfill its obligation to use the funds as directed. Furthermore, if deemed necessary, substitute facility awards may be structured to prevent the use of the awards by local governments for other projects:

> The federal condemnation statute [40 U.S.C. § 258a (1982)] allows courts to prevent windfalls by holding awards in trust and ordering further deposits by the United States when they are needed. Courts can use this statutory power to limit payments to market value until the public condemnee demonstrates that the extra money will be used to provide a new facility.

Note, *Just Compensation and the Public Condemnee*, 75 Yale L.J. 1053, 1058 (1966) (footnotes omitted).

Substitute facility awards in public condemnation cases are not only reasonable, fair, and just; they are also workable. The fifth amendment compels that functionally equivalent substitute facility costs be awarded when fair market value for a condemned site is inappropriate or inadequate.

II. FUNCTIONALLY EQUIVALENT SUBSTITUTE FACILITY STANDARD MUST BE APPLIED WHENEVER FEDERAL CONDEMNATION DEPRIVES A PUBLIC ENTITY OF A NECESSARY PUBLIC BENEFIT AND FAIR MARKET VALUE APPROACH IS INADEQUATE TO REPLACE THAT BENEFIT

Fair market value for condemned public property is and should be the measure of just compensation when the property

is no longer used or needed to promote a public purpose[6] or when the fair market value is in excess of the cost of a needed substitute facility.[7] Fair market value is not, however, a measure of just compensation when the fair market value of condemned public property is less than the cost to the public of replacing the benefit bestowed by the property. In such an instance, the reasonable-necessity/substitute-facility analysis developed by the lower courts and reiterated in *Lutheran Synod*, 441 U.S. at 515, is the only proper measure of just compensation.

Public entities are unique. Because of their uniqueness, the petitioner's contention that a reasonable-necessity/substitute-facility analysis must be foreclosed whenever public property has a determinable market value is utterly devoid of logic or rationale. The contention is also without legal support. The petitioner's sole "authority" for the proposition that public condemnees are not entitled to the cost of needed substitute

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[6] *See, e.g., United States v. 1,727.91 Acres of Land*, 563 F.2d 357, 361 (8th Cir. 1977), in which the Eighth Circuit reversed the trial court's finding that, because a drainage district no longer needed condemned levees and drainage ditches, the district was entitled to only nominal damages. Noting that "the facilities are not to be replaced," the Eighth Circuit held that fair market value—i.e., "the value of the Drainage District's land, albeit with old, fully depreciated levees and ditches on the land"—to be the measure of just compensation.

[7] The justification for awarding the fair market value in such a case is apparent:

> If the property [which had a higher market value than its replacement cost] had not been condemned, the state could have sold it, built a new facility, and kept the difference. Federal condemnation should not deprive the state of such profits. Since indemnification is designed to put the owner of property in the same position he was in before condemnation, market value should be awarded in such cases.

Note, *Just Compensation and the Public Condemnee*, 75 Yale L.J. 1053, 1058 (1966) (footnotes omitted).

facilities if the condemned property has a determinable fair market value is *South Dakota Game, Fish and Parks*, *supra*. A closer look, however, at the facts relevant to *South Dakota Game, Fish and Parks* discloses a case which was as much one of private condemnation as it was of public condemnation. As the former, its holding is consistent with *Lutheran Synod*. As a public condemnation case, its rejection of the substitute facility doctrine is more apparent than real. In either case, the facts and holding of *South Dakota Game, Fish and Parks* are without relevance, analogy, or application to this case or other cases of public condemnation.

South Dakota Game, Fish and Parks arose when the federal government condemned an island park in the Missouri River in 1960 as part of the construction of the Big Bend Dam downstream. The park had been created by Congress in 1899 when it established a public trust granting the island to the City of Pierre as trustee on the express condition that the land be used and preserved as a public park. *See South Dakota Game, Fish and Parks*, 329 F.2d at 666. In 1937, by congressional enactment, the park was designated as a wild game refuge, and three years later "Congress specified that the City of Pierre could own and operate certain recreational facilities and lease land for certain purposes . . . ." *Id.* Congress authorized the city to transfer its interest in the island to the Department of Game, Fish and Parks in 1947.

The property condemned was not just the land held in trust by the Game, Fish and Parks Department but the facilities built on the land leased by the department. When the district court awarded $1,062,250 as the cost of a substitute site, it made that award not just for the land held by the state but for the improvements to the land which had been constructed by the Izaak Walton League, the Boy Scouts of America, the Girl Scouts of America, and the Pierre Country Club.[8] Not sur-

[8] At the trial from which the appeal to the Eighth Circuit was

(Footnote continued on following page)

prisingly, the considerations voiced by the Eighth Circuit in reaching its conclusion that there was no "need or justification for a departure from the concept of market value" were the considerations voiced by the Court in *Lutheran Synod* —i.e., the subjective nature of value; the need for an objective standard to determine value. *See South Dakota Game, Fish and Parks*, 329 F.2d at 666-68. Given the number and nature of the private condemnees, it is understandable that the court decided, as the Court did in *Lutheran Synod*, that the fair market value of the condemned facilities constituted just compensation.

Implicit in the court's conclusion that there was no "need or justification for a departure from the concept of market value as the standard of compensation" (*id.* at 668) was at least a passing consideration of the need for a substitute park.[9] The condemnation occurred at a time when the dams which had been built as part of the Missouri River Basin Development Project had already formed new, large lakes in central and southeastern South Dakota which in turn had created entirely new recreational areas.[10] That the court should implicitly find that the recreational needs of a state of 680,000 were ade-

(Footnote continued from preceding page)

taken, the court adopted a unitary approach to determine the total cost of a substitute facility which included the value of the lessees' improvements. The judgment award encompassed, therefore, the value of the facilities constructed on the island by the private organizations. A second trial was contemplated which would have determined what portions of the judgment were owed the individual condemnees as replacement costs. Telephone interview with Warren W. May, Esq., May Adams, Gerdes & Thompson, Pierre, South Dakota (Aug. 28, 1984).

[9] Since the condemned park was held in a public trust which was created by the federal government, it is arguable that the state had no legal obligation to replace the park once the federal government condemned the subject of the trust.

[10] *See* H. Schell, *History of South Dakota* 304-06 (1961).

quately cared for and hold that fair market value was an appropriate measure of compensation is not, therefore, surprising. That decision does not, however, in any sense control the public condemnee who is the owner of a facility which it is legally or factually obligated to maintain for the public benefit.

CONCLUSION

Lutheran Synod dealt exclusively with the issue of the measure of just compensation owed a private condemnee. Based on its unique facts, *South Dakota Game, Fish and Parks* endorsed the use of a fair market value in public/private condemnation when there was no need or justification not to use that method of just compensation. Neither *Lutheran Synod* nor *South Dakota Game, Fish and Parks* addresses the issue of the public condemnee for whom fair market value is not an adequate measure of replacing the condemned property; neither forecloses an award of the cost of functionally equivalent substitute facility.

The substitute facility doctrine which has evolved in the lower courts recognizes that a public condemnee is frequently required, either legally or factually, to maintain a benefit or service even though the property which has provided that benefit or service is condemned. The substitute facility doctrine recognizes the economic reality that governments do not operate for profit and that the fair market value of condemned property may not reflect its social utility or the cost of securing a substitute facility. The court below correctly held that the cost of a functionally equivalent substitute facility was the proper measure of the just compensation owed the City of Duncanville under the fifth amendment. That holding and the measure of just compensation which it sanctioned should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

No. 83-1170

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

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REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. Respondent makes little effort to justify the result it advocates by reference to the general principles of just compensation established by this Court's decisions. And to the extent respondent makes any such effort, the argument is based largely upon an untenable view of the record that is belied even by the decision of the court of appeals that respondent seeks to uphold.

Respondent does not claim that this is a case in which the market value of the condemned property is not ascertainable or in which prior sales are an unreliable guide to the actual exchange value of the property taken — *i.e.*, the price that "a willing buyer would pay in cash to a willing seller" at the time of the taking (*United States* v. *Miller*, 317 U.S.

369, 374 (1943)).[1] Respondent apparently relies instead on the second of the two exceptions to the fair market value standard of valuation recognized by this Court (see U.S. Opening Br. 20): the presence of circumstances that render use of the fair market value standard manifestly unjust. Respondent claims, in other words, that in this case the fair market value standard falls short of true indemnification — which respondent equates with the cost of substitute facilities.

But respondent does not attempt to explain why market value compensation should fall short of the *reasonable* cost of substitute facilities after adjustments are made to factor out so much of that cost as is attributable to the greater value of the replacement facility as compared with the property taken. Compare U.S. Opening Br. 27-28, 29-31. Instead, respondent falls back (Br. 8-9) upon the discrepancy between the alternative verdicts returned by the jury

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[1]There may be some suggestion in respondent's statement of the case (Br. 1-4) that respondent regrets its concession below (see Pet. App. 7a) that the fair market value of the property taken is reasonably ascertainable. But the testimony at trial of both the government's witnesses and respondent's witnesses supports that concession (see U.S. Opening Br. 4 & n.2), and it is in any event too late for respondent to abandon the theory on which it has relied throughout the proceedings in the courts below. As we have indicated (U.S. Opening Br. 22-23 & n.13), we have no quarrel with the use of an appropriately adjusted substitute facilities standard in cases where just compensation must be fixed for the taking of state or local government facilities for which fair market value is not reasonably determinable. We note that the arguments of the amici curiae appear to be addressed, in significant part, to situations in which comparable sales are unavailable or do not provide a reasonably reliable guide to the market value of condemned property (see Council of State Gov'ts Br. 8, 17-18; Open Lands Projects Br. 11 (discussion of valuation of marshland property)). Those arguments are not responsive to the question framed for decision. Respondent likewise appears (Br. 10) to lose sight of the fact that we do not challenge the application of the substitute facilities doctrine when fair market value is not reasonably determinable.

in this case under the two valuation standards propounded by the district court (see U.S. Opening Br. 5-6). But respondent's claim that, "even after the jury considered possible benefits and possible unreasonable costs, the City's loss exceeded the fair market value of the condemned land" (Br. 9) is belied by the court of appeals' determination — not directly challenged by respondent — that the substitute facilities instruction given to the jury "did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (Pet. App. 14a).[2] Thus respondent's reliance upon the verdicts rendered below is misplaced.[3]

2. The amici curiae assert that standards applicable to the assessment of just compensation when private property is taken can not be applied to the taking of publicly-owned property. But no justification for such special treatment is provided that can withstand examination.

a. It is first claimed that substitute facilities typically cost more than the fair market value of the property they replace. (Council of State Gov'ts Br. 6, 11; see also Open

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[2]Moreover, respondent's characterization (Br. 8) of its acquisition of the 113.7 acre substitute site in Ellis County as an "arm's length transaction" is belied by the testimony of its own witness at trial. See U.S. Opening Br. 5.

[3]As a general matter, it should not be open to condemnees to go to the jury upon alternative measures of valuation, in the hope that a discrepancy will emerge that will justify abandonment of the fair market value standard. Any such approach would largely destroy the usefulness of the fair market value standard as "a clear, easily administrable rule governing the measure of 'just compensation' " (*Kirby Forest Industries, Inc.* v. *United States*, No. 82-1994 (May 21, 1984), slip op. 8 n.15). It would also tend to elide the prescribed division of authority between court and jury in condemnation cases. It is the province of the court to determine the applicable law and to decide collateral issues; the jury determines only the amount of just compensation. Fed. R. Civ. P. 71A(h); *United States* v. *Reynolds*, 397 U.S. 14 (1970).

Lands Project Br. 2.) No empirical evidence is offered and no theoretical explanation supplied for this bald assertion. In any event, if this contention is correct, it is presumably only because of the phenomenon noted by Justice White in his concurring opinion in *United States* v. *565.54 Acres of Land* (*Lutheran Synod*), 441 U.S. 506 (1979): "Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer" (441 U.S. at 518; footnote omitted). In any event, the amici do not explain how this factor sets the public condemnee apart from a host of private condemnees — such as the owner of an industrial plant who may be required by condemnation to replace a facility that is aged but still serviceable with a new facility that is more expensive but has a longer remaining useful life. Amici Open Lands Council, et al., do not quarrel, moreover, with the court of appeals' conclusion that an award of just compensation to a governmental condemnee must reflect subtraction from the cost of replacement facilities of an amount reflecting the greater lifetime or value of the new facility. Under this view, however, the greater price of a replacement facility attributable to its greater value is no longer a reason for providing an extra measure of compensation to the condemnee, and hence no justification for employing a substitute facilities measure of compensation at all.

b. The Council of State Gov'ts, et al., on the other hand, reject the court of appeals' view, denying (Br. 19) that any deduction should be made from the cost of a substitute facility. These amici reason that the cost of the added value of a replacement facility should be borne by the United States because "the necessity of acquiring the better facility is not due to anything the state or local government did, but to the federal government's desire to take the existing lower cost facility" (Br. 19-20; see also Br. 13). Again, of course, this observation (to the extent it may be accurate) does not

distinguish the governmental condemnee from its private counterpart. In any event, the position of the amici is contrary to the Court's teaching that a condemnee "must be made whole but is not entitled to more" (*Olson* v. *United States*, 292 U.S. 246, 255 (1934)). No warrant exists under the Just Compensation Clause for "subsidies," such as those the amici would exact, for "either private or public projects" (*Lutheran Synod*, 441 U.S. at 518 (White, J., concurring)); Just Compensation must be " 'just' both to an owner whose property is taken and to the public that must pay the bill." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).[8]

The Council's position is, at root, inconsistent with the indemnity principle upon which it ultimately places its reliance (see Br. 10). For if a governmental condemnee purchases a more expensive, but more valuable, substitute facility, its pecuniary position necessarily reflects both the extra expense incurred and the correspondingly more valuable asset procured.[9] Nor can these amici deny that the

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[8]Although such payments are not required by the Fifth Amendment, Congress might decide for policy reasons to provide such a "subsidy," in the form of substitution costs, to state and local governmental condemnees, much as payment of relocation and substitute housing cost subsidies to certain persons displaced by the exercise of federal eminent domain is required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* See U.S. Opening Br. 25 n.16; *Lutheran Synod*, 441 U.S. at 519 n.8. Such policy decisions, and the legislative factfinding upon which they must inevitably rest, are tasks properly entrusted to the legislative branch.

[9]We assume, of course, that the price paid for the substitute facility is reasonable. As we have noted (U.S. Opening Br. 29-29), the power of eminent domain typically enjoyed by governmental condemnees provides extra assurance that the condemnee need pay no more than fair market value for any substitute facility. (Of course, if no meaningful market exists in property of the kind condemned (and thus of the kind needed for a replacement facility), a governmental condemnee, like any other condemnee, is not bound by the fair market value standard. See page 2 note 1, *supra*.)

market value of property held for use by a governmental entity is cognizable in the computation of Just Compensation. Indeed, the amici eagerly embrace the rule that just compensation should not be limited to substitution costs when fair market value exceeds substitution cost. Council of State Gov'ts Br. 14 n.5; see also Open Lands Project Br. 14-15 & nn.6, 7; U.S. Opening Br. 26-27. As the briefs of the amici make clear, however, that rule rests upon the very principle we advocate here — that, for indemnification purposes, the pecuniary position of the governmental property owner must be taken to include the full market value of property. The amici provide no justification for their "heads I win, tails you lose" rule of decision.*

c. The Open Lands Project, et al., claim (Br. 10-11) that fair market value is an inappropriate measure of compensation due a governmental condemnee for taking of its property because the "commercial for-profit" uses that are open to buyers in the market, and which support the market price of property that could be purchased as a replacement facility, are foreclosed to the condemnee. This contention defies all economic logic. When it stands in the position of seller (*i.e.*, as condemnee), the governmental property owner receives a benefit from this phenomenon that is commensurate with any "hardship" it suffers as purchaser of a substitute site. Indeed, these amici seem, at first, to concede as much, observing that "both the buying price and the selling price of the commercial facilities will necessarily reflect a commercial for-profit use of the facilities" (Br. 10; see also Br. 13). Yet the amici insist the fair market value compensation paid to the governmental condemnee will not embody this increment of worth because the property frequently will be, as here, already "well-used," and will accordingly be of

*Respondent apparently recognizes (Br. 13) that its position logically requires governmental condemnees to forego market value compensation when the property taken need not be replaced.

low value — its commercial potential already depleted (Br. 10-11). But this last point is an irrelevancy. The short of the matter is that the condemnee confronts market-determined prices both as seller in condemnation and as buyer of substitute facilities. If the utility, and thus the economic value, of the property taken has been depleted, the indemnity principle does not require — and indeed does not permit — that just compensation match the price of a brand new substitute facility.*

3. Rejecting both the fair market value standard of just compensation and the substitute facilities measure prescribed by the court of appeals, the Council of State Gov'ts, et al., offer their own novel procedure for measuring just compensation due upon taking of governmental property (Br. 14-16). These amici suggest that "just compensation" is ordinarily the fair market value of the actually available replacement property or facility that most closely approximates the use characteristics of the property taken. In practice, however, that value is apparently to be presumed to be equal to the price actually paid by the condemnee for a replacement, subject to any proof by the United States that "another facility equally similar to the condemned one could have been obtained less expensively" (Br. 15, footnote omitted). The proffered rule has several exceptions. For instance (Council of State Gov'ts Br. 16 n.8):

> There can be unusual circumstances in which property most similar to a condemned parcel is nonetheless so much more expensive than other clearly serviceable property that it is plainly unreasonable to acquire the

*The argument of these amici (Br. 15) appears to rest upon the erroneous equation of the fair market standard of compensation in condemnation with a "distress sale" price, as distinguished from a true "commercial" market value. This assumption, of course, is directly contrary to the fair market value standard as defined by this Court. See U.S. Opening Br. 27.

> most similar facility. In such unusual circumstances the jury should be free to award the state or local government only the cost of the less similar but plainly serviceable facility, since the more similar one can be deemed not to have been reasonably available at reasonable cost.

In addition, it would apparently be open to the United States to argue to the trier of fact that the condemnee could have reduced substitution costs by using its power of eminent domain, while the condemnee could argue the contrary, or that it should not, for policy reasons, have been required to resort to eminent domain itself (Council of State Gov'ts Br. 15-16 n.7).

a. Even if the amici's proposal were, as claimed, an "easily workable, objective rule" (Br. 14) for determining just compensation, and even if it were, as claimed, easier to administer than the fair market value standard or the court of appeals' rather different formulation of the substitute facilities standard, its adoption would be wholly unjustifiable. The fundamental vice of the rule proposed is that, as the amici appear ultimately to acknowledge (Br. 19), it is a deliberate departure from the objective of the indemnity principle, requiring the United States to subsidize upgrading of state or local government facilities that happen to be affected by exercise of the federal power of eminent domain. As we have shown (pages 4-6, *supra*), and as the court of appeals below acknowledged (Pet. App. 13a-17a), even if it is reasonable for a municipal condemnee to acquire a replacement facility that is larger, newer, or otherwise more valuable than the property taken (and which is priced accordingly), it does not follow that the United States should be charged for the added benefit acquired by the condemnee.

In any event, the proffered rule (really rules) is scarcely the "easily workable" and "objective" formula the amici claim (Br. 14) to have discovered. The proposed rules are in fact riddled with subjectivity and complexity. The general rule proposed cannot be preferable to the fair market value standard because it actually requires an assessment of fair market value — the reasonable cost of the substitute facility. The amici apparently hope to simplify this assessment by resorting to the presumption that the condemnee has in fact purchased the most reasonable substitute, and has paid no more than fair market value therefor. But the presumption lacks verisimilitude, as the record of this case demonstrates. There is little reason to believe that erecting such a presumption — a rebuttable one — would simplify trial of just compensation. In any event, the amici have wholly overlooked the fact that the simplifying presumption they look to would be unavailable in many, if not most, cases for a substitute facility frequently will not have been acquired at the time just compensation is being determined. This is particularly so when so-called "straight condemnation" procedures are used, rather than the "quick-take" provisions of the Declaration of Taking Act that were employed in this case.[8]

The subjectivity and indeterminancy of the proposed standard is especially clear when the general rule proposed is considered together with its caveats and exceptions. *How*

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[8]Under straight condemnation title does not shift until compensation has been determined and final judgment entered and paid; no estimated compensation is available to the condemnee near the outset of the proceedings; the government is free to abandon the condemnation at any time prior to payment of the judgment. See generally, *Kirby Forest Industries, Inc.*, slip op 1-3, 10. Thus, in straight condemnation there is less need to acquire a substitute facility prior to assessment of just compensation and fewer resources are available with which to acquire such a substitute; there also is a risk of redundancy if a substitute facility is purchased prematurely.

much more expensive than another candidate for substitution must a facility actually purchased by the condemnee be for the condemnee's choice to be deemed unreasonable? *How much* less than equivalent to the facility taken may a candidate for substitution be and yet be deemed "serviceable." How is the trier of fact to be cabined in the exercise of what appears to be standardless discretion? Similarly intractable questions are raised by respondents' "general rule": how are similarity of features and reasonableness of cost to be judged absent the use of a market standard as a measuring stick. Curiously, the test devised by the amici — ostensibly in the name of federalism — would gratuitously thrust the federal courts into a series of rather intrusive inquiries concerning state or local government decisions. In striking contrast, the fair market value standard favored by this Court has an "external validity" (*Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949)) that obviates any such intrusive and subjective inquiries.

The pitfalls lurking in the amici's test are equally apparent in their discussion of the possibility of exercise of eminent domain authority by the condemnee in its search for a substitute site (Br. 15-16 n.7). The inquiry contemplated by the amici as to whether use of eminent domain would have reduced substitution costs is either an exercise in speculation about what a jury would do, or it is a backdoor route to introducing the fair market value standard into the amici's substitution cost formula. And how is a *jury* to assess the argument that "it is not fair" in a particular case "for a state or local government to have to impose the hardships of condemnation upon one of its citizens"?

b. The amici's argument (Br. 16-18) that their proposed formula for determining just compensation is more readily administered than the fair market value standard is founded on several serious misapprehensions regarding the fair

market value standard itself. First, reference to capitalization of income streams is essentially an irrelevancy; precisely because governmental property rarely generates income, this valuation method generally has no application to assessment of fair market value in cases where governmental property is taken.

The amici's quarrel with the preferred comparable sales method of valuation is based upon the assertion that such sales are frequently nonexistent or so rare as to be an unreliable guide to market value with respect to many kinds of governmental property (Br. 17-18). We freely concede the point — as we did in our opening brief (at 22-23 & n.13). The amici forget, however, that the court of appeals explicitly found (Pet. App. 6a-7a) that this is not such a case, and that the question presented here concerns only cases in which fair market value is reasonably determinable. The amici also stress (Br. 18) the subjective aspect of the determination that property that was the subject of a prior sale is comparable to the property taken. But whatever difficulty this factor may present does not distinguish condemnation of governmental property from purely private property. In any event, as we have shown, the proposed alternative method of valuation does not avoid but instead encourages proliferation of such subjective comparisons.

The Council's criticisms (Br. 18, 19) of the reproduction cost method of assessing fair market value and of the court of appeals' formulation of the substitute facilities standard are essentially the same: the absence of a mathematically exact means of comparing the value of a newer or larger facility with an older or smaller one. The amici are partially correct in this respect — quantification of the benefit

received by a property owner from an enhanced replacement facility is inherently a less than precise endeavor.[9] But that is why we have urged rejection of the court of appeals' standard for just compensation — it is at best an indirect and imprecise approach to fair market value, which in this case is agreed to be determinable through the relatively objective yardstick of comparable sales (see U.S. Opening Br. 29-31). Use of the market standard to value the property taken eliminates the need for subjective comparisons between the property taken and a replacement site; coupled with the reasonable assumption that the condemnee will pay market value for any equivalent replacement it achieves the objectives of the indemnity principle.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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[9]The amici concede (Br. 20 n. 10), however, that in this case the added benefit to respondent is easily demonstrable and readily quantifiable.